Public Accountability in the Governing of Professions: A Report on the Self-Governing Professions of Accounting, Architecture, Engineering and Law in Ontario

Prepared by
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for
The Professional Organizations Committee

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PUBLIC ACCOUNTABILITY IN THE GOVERNING OF PROFESSIONS: A REPORT ON THE SELF-GOVERNING PROFESSIONS OF ACCOUNTING, ARCHITECTURE, ENGINEERING AND LAW IN ONTARIO

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for
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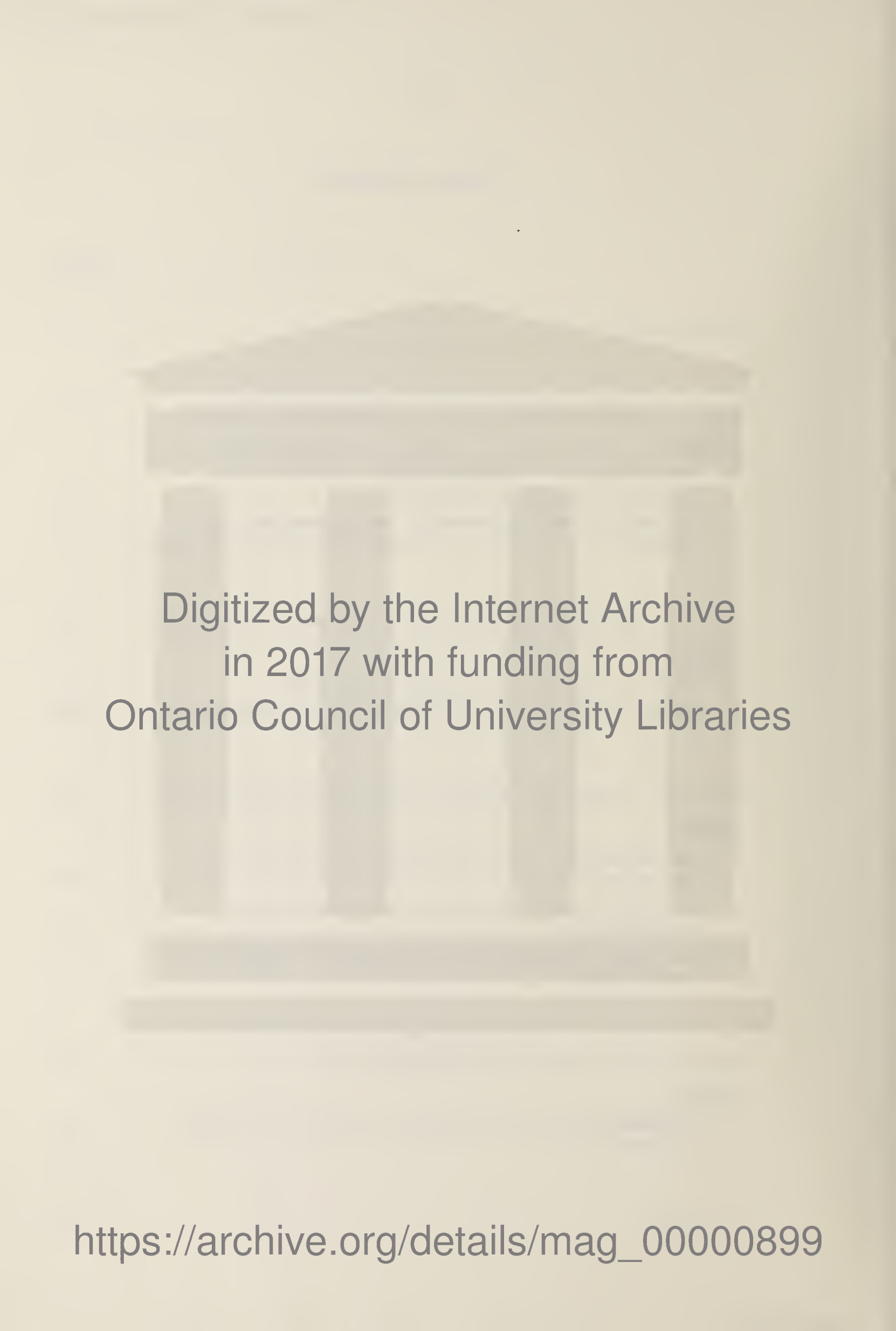

Introduction

This study examines the existing arrangements in the Province of Ontario for the governing of the professions of accounting, architecture, engineering and law. The purpose of this study is to assess these arrangements in relation to the principles of public accountability. The study, accordingly, has three purposes. First, the constitutional principles of public accountability are outlined. Second, an analysis and evaluation of the structures and processes of governing in the four professions are undertaken. The report concludes with recommendations for changes where present arrangements are lacking in adherence to these principles.

This report was prepared as a background study on one particular dimension of the governing of the above-noted professions. Insofar as the dimension in question is primarily concerned with our system of governing the professions, this study does not pretend to encompass more than the issues that related directly to the preservation and promotion of the constitutional principles of public accountability. These principles require that our focus be on the distribution of authority within our governmental structures and the procedures for the exercise of authority so distributed. The first of these considerations required an analysis of the concept and values of "public accountability" and this was undertaken in terms of a review of academic studies,

government reports and various commentories. The second involved an analysis of published reports and briefs on the subject as well as the conduct of interviews with those familiar with the Ontario experience. The latter were conducted primarily but not exclusively with a select number of government officials and professional group representatives. In all cases the individuals were selected because of their knowledge of and experience in the governing of the professions and not as spokesmen for their particular organizations or associations. Time did not permit a comprehensive survey of opinion among public and professional officials but an effort was made to ensure that a sufficient range of opinion and judgement was obtained via the interviews conducted for this report.

This report is organized into four parts. The first deals in an introductory way with the development of delegated authority in the context of Canadian government and also presents a brief overview of the Ontario experience with the four professions under consideration. The second part analyzes the concepts and values of public accountability and then presents an interpretation of the principles of public accountability as they relate to our constitutional system of government. The third part examines and evaluates the present arrangements in Ontario for the governing of the four professions in question. The final part sets forth the recommendations

which emanate from the preceding three sections.

As a final introductory note, it must be stressed that this report represents an attempt to analyze and assess a set of arrangements for the governing of a complex area of public affairs from the perspective of a set of principles which in themselves are complex. Complexity can introduce confusion, as it assuredly usually does, but, more important from the point of view of this study, the complexity of our public affairs often can be the rationale for ignoring what constitutes in and of itself an important question. The preservation and promotion of the principles of public accountability in governing constitute a question that ought not be ignored in the pursuit of other, however important, objectives. It is hoped that by focusing explicitly and specifically on this question this report will contribute to a serious consideration of public accountability on its own merits.

Part I: Self-Government and the Professions in Ontario

1. The Rationale for Self-Government: The Logic and Practice of Delegated Authority

The phenomenon of self-governing professions is but one example of a general characteristic of the distribution of authority in our Canadian political system. This characteristic is the widespread delegation of authority to agencies which exercise authority with some measure of independence from the principal executive, legislative and judicial organs of government. In principle, the exact measure of independence afforded these agencies is meant to vary according to the extent to which public policy is effected by the exercise of authority so delegated.[1] In practice, on the other hand, there has not been developed, in Ontario or elsewhere, a concrete set of norms to specify the conditions under which authority should or could be delegated. Rather, the arrangements whereby such authority has been delegated have been essentially ad hoc. Various post facto efforts have been made to categorize the different kinds of institutional arrangements which have been so established. For the most part, however, variations in these arrangements are the rule, not the exception.

Given our constitutional system of parliamentary government, this delegation of authority entails the capacity to establish and administer rules, regulations and orders which

have the force and status of "law."[2] As a consequence, many agencies which have been delegated authority by the state are involved in the exercise of judicial functions. For the purposes of this study, however, the analysis and evaluation will be restricted to the legislative and executive functions of delegated authority.

The reasons for the widespread deployment of delegated authority in the Canadian political system are numerous, and as is the case in such essentially political matters, complex.[3] Two general reasons must be noted.[4] The first is the desire to structure state intervention in a sphere of public affairs in a manner that restricts the capacity of government to exercise discretion in rule-making and adjudication. On the one hand, this restriction is a recognition of the principles of judicial independence which insist that adjudication be separate from the exercise of the executive functions of government. On the other hand, this restriction is a recognition of the political need to afford a measure of autonomy to those whose activities have been brought within the scope of law. In many instances both considerations apply; moreover, where this is the case the adjudicative character of such delegated authority often provides a rationale for granting considerable independence to an agency. The second general reason for delegating authority to independent agencies is that the kind of state intervention in question requires an administrative capacity

which a government, at least at the outset, neither possesses nor is willing to develop. The economic and/or political costs involved in direct intervention, in other words, are not regarded as commensurate with the economic or political benefits. It is for the above reasons that governments have been willing (some say much too willing) to delegate authority to agencies for which they will have to accept less than the usual responsibility.

An important datum in the increasing use of the instrument of delegated authority is that this extension of state intervention in a designated sphere of public affairs is often the result of initiatives taken by those most directly affected. This has been the case particularly where authority is delegated for the purpose of regulating commercial or professional practices. Corporate or group interests have been as much the determinant of this public policy of regulation as have been concerns for the protection of the public interest.[5]

The delegation of authority to agencies independent of government has been the method used by Canadian governments to provide for the governing of the major professions in Canada. The model of the self-governing profession is a tradition of the "learned professions" in the English-speaking world and, in a number of important respects, constitutes the major criterion by which occupations merit the designation

"professional." The recognition of a profession by the state *via* the delegation of authority for the purpose of self-government constitutes, accordingly, a much-desired status.

The dynamics whereby this kind of recognition is provided by the state are obviously dependent upon the particular characteristics of a profession. In general, however, there are a number of features which characterize the process of recognition. Two such characteristics are significant to this analysis. First, professional recognition has traditionally been reserved for those occupations in which the relationship between the practitioner and his client constitutes an "agency relationship", that is, "the client delegates decision-making authority to the practitioner .... and entrusts him with the making of decisions on behalf of and in the interest of the client."[6] An agency relationship thus entails more than a recognition of the practitioner's knowledge or skills. Knowledge and skill are necessary to the practice of the learned and technological professions but are not a sufficient condition for the establishment of an agency relationship. Such a relationship requires that there be a delegation of authority by the client to the practitioner. This delegation is the *sine qua non* of a "professional" relationship. The second feature of professionalism is that "the providers of a service stand in a professional relationship to consumers to the extent that

the provision of that service is regulated by an organization of providers exercising authority delegated by the state."[7] This second kind of agency relationship is necessary because the state must deploy as its agent those with the knowledge and experience necessary to judge who is qualified to practise a profession and what norms should govern such practice. On behalf of "society organized", the state must enter into an agency relationship with the "profession organized" because the public interest requires both a public awareness of the responsibilities of professionals and a regulation of their practices.

It is the delegation of authority by the state to an organized profession which creates an agency relationship between the state and the profession. The latter acts as the agent of the former for the particular purposes of protecting and promoting the specific public interests which pertain to the provision of professional services. The establishment of this kind of agency relationship between two different levels of social organization, one comprehensive of society, the other restricted to certain designated persons, is clearly analogous to the agency relationships established between individuals who are clients and professionals respectively. Two points must be noted in regard to this analogy.

In the first place, individuals engage the services of

professionals not only in order to establish agency relationships with them. In addition to their needs which can best be served by professionals acting as their agents, clients also make use of professionals for a wide variety of advisory and service functions. Some of these latter functions are only indirectly, if at all, related to the specific professional functions undertaken as the result of a delegation of authority. Professionals, in other words, can be engaged to perform consultancy, research or technical functions which are not performed in an agency relationship, strictly defined. In a similar way, the state may use an organized profession for purposes which are only indirectly, if at all, performed as a direct consequence of the delegation of authority by the state to the profession. The organized profession may also perform consultancy, research or technical functions for the state. Although it is often difficult to separate the functions which stem directly from an agency relationship from those which do so only indirectly, this point is raised here in an introductory way because the differentiation of such functions has an important bearing on the delegation of authority that is established for the governing of the professions in the public's interests.

Secondly, it is necessary to note that there is an elementary but nevertheless fundamental distinction in the relationships that obtain between a client and a professional on the one

hand and between the state and a profession on the other. This distinction arises as a consequence of our constitutional system whereby authority delegated to an organized profession does not displace the public accountability of the state for the way in which a profession is governed. Unlike the individual professional-client agency relationship, in the relationship between the state and an organized profession there is no higher constitutional authority to which one or the other parties to this relationship, or indeed a third party, might appeal.

2. A Profile of Self-Government: The Professions of Accounting, Architecture, Engineering and Law in Ontario

In the Province of Ontario each of the four professions in question constitutes an organized profession as defined in Chapter 1. There are clearly differences between them in this regard but for our purposes it is sufficient to note that they are self-governing in the most important respect. They are organized as professions, (which is not just or merely to say that there are organizations to which professionals belong); and their organizations are delegated authority by provincial statutes to govern their professions on behalf of the province, (which is not just or merely to say that they are responsible

for administering their own affairs).

The four professions achieved self-governing status at different times and with somewhat different powers, responsibilities and structures. In each case, however, the central issues of public policy centred on the establishment of a system that afforded an important measure of independence, freedom and autonomy from "government." The establishment of self-government in these cases did amount to state intervention in the practice of these occupations; but, in no instance was this intervention designed as, or interpreted to constitute, an initiative on the part of political authorities to dictate the way in which these professions should be governed. Rather, this "intervention" was predicted on the assumption that a delegation of authority for self-government was the most efficient and effective method of defining and regulating the practice of these professions.

Self-governing professions can be established, as has been the case in Ontario, in a number of ways. It is not the intention here, however, to provide an historical analysis of the formation or evolution of the four professions in question. Instead, the purpose of this chapter is to outline the different kinds of structures that have been created for them. Accordingly, each profession will be examined in turn.

Accounting

The practice of 'public' accounting in the Province of Ontario has been subject to professional self-government for over a quarter of a century. The delegation of authority to effect this policy was granted by The Public Accountancy Act whereby a Public Accountants Council is established for governing the practice of public accounting.[8] In Section 7 of this Act the functions of the Council are specified as follows:

> It is the duty of the Council to administer the provisions of this Act and in particular, but without limiting the generality of the foregoing, the functions of the Council include,
>
> (a) the grant or refusal of licences, in accordance with this Act;
>
> (b) the maintenance and, if thought fit, the publication of a roll of the persons for the time being licensed under this Act;
>
> (c) the prescription of the fees payable on the grant or renewal of licences under this Act;
>
> (d) the maintenance and improvement of the status and standards of professional qualifications of public accountants practising as such in Ontario;
>
> (e) the consideration of matters of common interest and concern to public accountants, and the submission of representations to any government department or public authority with reference to any such matters;
>
> (f) the provision of scholarships for students in public accountancy and of maintenance grants for such students whose means appear to the Council to be insufficient to enable them to pursue their studies;
>
> (g) the conduct and encouragement, whether by means of financial assistance or otherwise, of research in accountancy;
>
> (h) the exercise of the disciplinary powers conferred by this Act; and

(i) the prosecution of offences under this Act.[9]

Section 31 of the Act grants the Council the following authority:

> (1) Subject to the provisions of this Act, the Council shall or may, as the case may be, prescribe by regulation anything that is by this Act required or authorized to be prescribed and may make such further provisions as may seem to the Council necessary or desirable for carrying out or facilitating any of the purposes of this Act.[10]

The Public Accountancy Act, in Section 1, defines what is meant by the public practice of accountancy and, in Section 14, establishes the qualifications required of a person who wishes to obtain a licence to practise as a public accountant. The Council is the licensing body for the purposes of this Act but the Act itself also establishes a "qualifying body", namely the Institute of Chartered Accountants of Ontario,[11] of which, with some exceptions, a candidate for a licence must be a member. Membership in this Institute can be obtained by candidates who have met the educational and experience requirements set down by the Institute.

The practice of public accounting is limited to those who possess licences from the Public Accountants Council, and thus it is an offence against the Act for persons without such a licence to practise public accounting. In addition, those who practise this profession are regulated both by provisions of the Act and by the Rules of Professional Conduct issued by the Council under the authority of Section 7. Section 18(1)

of the Act and Section 8 of the Regulations of the Council provide Council with the power to revoke a licence.

The Public Accountants Council is composed entirely of members selected by the organized profession of public accounting. Its fifteen members must be licensees under The Public Accountancy Act. Twelve of the fifteen positions on the Council are held by members appointed by the Council of the Institute of Chartered Accountants of Ontario; the remaining three are held by members elected by and from those licensees who are not members of the qualifying body. The term of office for members is two years and members are eligible for re-appointment or re-election as the case may be. The term of office for officers of the Council, who are elected by and from among the members of the Council, is one year. The legislative and executive initiatives of the Council are decided by a majority of votes of members present and voting is done by a show of hands except that:

(2) No resolution of the Council relating to,

(a) any of the functions of the Council referred to in clause h or i of section 7 quoted above;

(b) the making of regulations under section 31 also quoted above;

(c) the revocation or non-renewal of a licence granted under this Act; or

(d) the granting of an exemption to any person pursuant to subsection 2 of section 14 from any of the conditions of section 14, or the approval of conditions subject to which such exemption shall be granted,

> is valid unless approved by the votes of at least three-quarters of the members of the Council present and voting thereon.[12]

Furthermore, with respect to the Council's legislative powers, that is, to "prescribe by regulation" under Section 31(3),

> The Lieutenant Governor in Council may annul any regulation made by the Council under this Act.[13]

Finally, the revenues of the Council are derived solely from the licence fees which are collected from those licensed to practise public accounting in Ontario.

Architecture

The practice of architecture in the Province of Ontario has been the subject of professional self-government for over four decades. Under The Architects Act,[14] a Registration Board is established as part of the Ontario Association of Architects, with the following authority:

> 10. (1) The Board may make regulations,
>
> (a) for the admission of members of the Association and the annual renewal of membership therein;
>
> (b) prescribing the qualifications of persons to be admitted and the proofs to be furnished as to education, good character and experience;
>
> (c) prescribing examinations for admission and the method of conducting them;
>
> (d) for keeping a register of members of the Association and for issuing certificates of membership under the seal of the Association and calling in such certificates where membership lapses or is cancelled or suspended;

(e) prescribing the fees to be paid on admission of members to the Association, by associates and student associates, on examinations, on annual renewal of membership in the Association and as annual fees by associates and student associates;

(f) providing for the discipline and control of members of the Association, including provision for the signing or sealing of drawings and specifications prepared by members of the Association;

(g) providing for the cancellation of membership for non-payment of fees and for the cancellation of membership where a member changes his domicile to a place outside the Commonwealth;

(h) providing for the election of members of the Council and of the elective members of the Board, for the holding of meetings of the Board and for fixing the quorum of the Board;

(i) for the election of a chairman and vice-chairman and the appointment of a secretary and such other officers of the Board as it desires and for prescribing their duties, and, subject to the provisions hereinafter contained, for fixing their remuneration;

(j) for granting temporary licences to practise architecture under section 6 and fixing the fees to be paid thereon;

(k) generally for the better carrying out of the powers vested in the Board;

(2) Subject to the approval of the Lieutenant Governor in Council, the Board may make regulations,

(a) providing for the investigation of any complaint that a member of the Association has been guilty of misconduct or incompetence, so as to render it desirable in the public interest that his membership be suspended or cancelled;

(b) providing for the cancellation or suspension of the membership of any person found by the Board to be guilty of misconduct or incompetence and for the publication in the public press of notice of such cancellation or suspension and the reasons therefor;

(c) providing the terms and conditions on which a member whose membership has been cancelled may in a proper case be restored to membership.[15]

The Registration Board constitutes, in effect, the agent of the state for the purpose of governing the practice of architecture. It is part of the Ontario Association of Architects in an organizational sense, but, as noted above and as stated in Sections 5, 6, and 16 of the Act, it also has authority to determine who shall be entitled to practise as an architect. By virtue of Section 5 it is the Board which grants membership to the Association and this constitutes a licence to practise. There is no analogous authority to the qualifying body established under The Public Accountancy Act; rather the Board itself is the qualifying body with authority to prescribe the qualifications necessary of an application for membership in the Association.

The practice of architecture is defined in the Act in such a way that anyone who is not either a member in good standing of the Association or licensed by the Board and "holds" himself out to be an architect is guilty of an offence under the Act and on summary conviction is liable to a fine for a first offence, a fine and/or imprisonment for a subsequent offence. What constitutes "holding out" is defined in Section 16 of the Act (which includes the above-noted provisions), subject to a list of provisos. Those entitled to practise the profession

of architecture are regulated in their practice by the Board by virtue of regulations made under authority of Section 10 (1)(f) and (2)(a) and (b) of the Act and established as the Regulations of the Registration Board.

The Registration Board is composed of three categories of members in accordance with the following Section (8)(1) of the Act:

> The Registration Board of the Association, in this Act called the "Board", is continued and shall carry on the functions of the Architects' Registration Board established under The Architects' Act, 1931, except as herein varied, and the Board shall be composed as follows:
>
> 1. One member of the Association to be appointed by the University of Toronto and one member of the Association by each other university, college or body in Ontario that is by law authorized to grant degrees in architecture and that establishes and maintains to the satisfaction of the Board a faculty, school or department of architecture in connection therewith, each member appointed under this paragraph to hold office for a period of three years from the 1st of January following his appointment.
>
> 2. One member of the Association to be appointed by the Lieutenant Governor in Council, to hold office for a period of three years from the 1st January following his appointment.
>
> 3. Three members of the Association for the first appointee under paragraph 1 and one additional member of the Association for each additional appointee under paragraph 1, these members to be elected in the manner hereinafter provided, and each to hold office for three years from the 1st day of January following his election. [16]

The elected members of the Board are elected by the membership

of the Association and the officers of the Board are elected, for one year terms, from and by the members of the Board.

Finally, the revenue required by the Board in order for it to perform its duties is to be provided, by virtue of Section 12 of the Act, by the Council of the Ontario Association of Architects. This latter body has authority for managing the affairs of the Association and promoting the practice of architecture except with respect to those matters "reserved for regulation by the Board" under Section 10 of the Act.[17]

Engineering

A self-governing profession for the practice of engineering is established by The Professional Engineers Act under which the "body politic and corporate known as the 'Association of Professional Engineers of the Province of Ontario'" has the following objects:

> (a) to regulate the practice of professional engineering and to govern the profession in accordance with this Act, the regulations and by-laws;
>
> (b) to establish and maintain standards of knowledge and skill among its members; and
>
> (c) to establish and maintain standards of professional ethics among its members
>
> in order that the public interest may be served and protected.[18]

The Act defines the "practice of professional engineering"

(Section 1(i)) and establishes a Council of the Association which, in addition to its powers to administer the "domestic affairs" of the Association,

> may make regulations respecting any matter that is outside the scope of the power to pass by-laws specified in Section 8 (that is with respect to the "administrative and domestic affairs of the Association") and, without limiting the generality of the foregoing,
>
> (a) prescribing the scope and conduct of examinations of candidates for registration;
>
> (b) prescribing the form of the summons referred to in subsection 10 of Section 25;
>
> (c) respecting the practice and procedure for hearings held under this Act;
>
> (d) defining "professional misconduct" for the purpose of this Act and the regulations;
>
> (e) defining classes of specialists in the various fields of engineering;
>
> (f) prescribing the qualifications required of specialists or any class thereof;
>
> (g) providing for the designation of specialists upon application and examination or otherwise, for the suspension or revocation of such designations, and for the regulation and prohibition of the use of terms, titles or designations by professional engineers indicating specialization in any field of engineering;
>
> (h) regulating and prohibiting the use of terms, titles or designations by professional engineers in independent practice.[19]

In addition to its role as agent of the state for the governing of the engineering profession, the Council of the Association is also the governing body of the Association. Accordingly, it has the authority, by virtue of Section 8 of the Act, to:

...pass by-laws relating to the administrative and domestic affairs, and, without limiting the generality of the foregoing,

(a) respecting the determination and modification of the boundaries of regions and the determination of regions in which members shall be deemed to reside for the purposes of the election of councillors;

(b) prescribing procedures for the nomination and election of the councillors and the nomination and election of the president and the vice-presidents and the qualifications necessary to hold any such office;

(c) prescribing the duties of the councillors and rules governing their conduct;

(d) respecting the remuneration and reimbursement of members of the council;

(e) respecting the calling, holding and conduct of meetings of the council and the Association;

(f) providing for the establishment and regulation of chapters;

(g) respecting the management of the property of the Association;

(h) providing for the borrowing of money on the credit of the Association and the charging, mortgaging, hypothecating or pledging of any of the real or personal property of the association to secure any money borrowed or other debt or any other obligation or liability of the Association;

(i) respecting the application of the funds of the Association, and the investment and reinvestment of any of its funds not immediately required in any investments that may from time to time be authorized investments for joint stock insurance companies and cash mutual insurance corporations under The Corporations Act;

(j) defining the composition and functions of the board of examiners;

(k) providing for the establishment of scholarships, bursaries and prizes;

(l) providing for the appointment of committees of the council and defining their composition and functions;

(m) providing for the closing of the register and the restriction of recording changes of addresses of the registrants for a period of time not exceeding forty-eight hours, exclusive of Sundays and holidays, immediately preceding any meeting of the members or any election;

(n) respecting the registration of members and the recording of licensees, graduates, undergraduates and assistants to professional engineers;

(o) for maintaining a system for the recording of registrants, their residence addresses and the regions in which they are resident and for the recording of the names of official representatives of partnerships, associations of persons or corporations;

(p) providing for services to encourage and assist members in the development of their professional competence and conduct and in carrying on the practice of professional engineering;

(q) fixing and providing for levying and collecting or remitting annual and other fees, levies and assessments;

(r) prescribing forms and providing for their use;

(s) respecting all other things that are deemed necessary or convenient for the attainment of the objects of the Association and the efficient conduct of its business.[20]

The composition of the Council, as prescribed by Section 4 of the Act, is as follows:

(l) There shall be a council which shall consist of a president, a first vice-president, a second vice-president, an immediate past president, two elected councillors-at-large, ten elected regional councillors and five appointed councillors, all of whom shall be members and residents of Ontario.

(2) The president and the vice-presidents shall have such qualifications as are prescribed by by-law and shall be elected annually by vote of the members.

(3) One councillor-at-large shall be elected each year for a two-year term by vote of the members.

(4) There shall be elected from each of the five regions established and defined by by-law two regional councillors, one to be elected from each region each year for a two-year term by vote of the members who are recorded as residents in that region at the time the election is held.

(5) The five appointed councillors shall be appointed by the Lieutenant Governor in Council for a term of three years and shall be qualified respectively in the following fields of engineering:

1. Civil.
2. Mechanical, Aeronautical and Industrial.
3. Electrical.
4. Chemical and Metallurgical.
5. Mining and Geology.

(6) In addition to the councillors mentioned in subsection 1, the Lieutenant Governor in Council may appoint as councillors,

(a) a person who is not a member; and
(b) a person who is a barrister and solicitor of at least ten years standing at the bar of Ontario,

both of whom are residents of Ontario.

(7) Persons appointed under subsection 6 shall serve for a term of three years but are eligible for re-appointment.

(8) Where the president, a vice-president or a councillor resigns, is absent from three consecutive meetings of the council, becomes incapacitated or dies, the office may be declared vacant by the council, and, if such office should be declared vacant, except in a case of a councillor appointed by the Lieutenant Governor in Council, the council shall fill the vacancy in such manner as is provided by by-law, and in the case of a vacancy in the office of a councillor appointed by the Lieutenant Governor in Council, the Lieutenant Governor

in Council may fill the vacancy by appointment of a person of the same class as the councillor causing the vacancy.

(9) No person shall be appointed or elected to the council unless he is a Canadian citizen or other British subject, and no person shall continue to hold any such office if he ceases to be so qualified.[21]

The Council, in carrying out its functions as assigned by this Act, has the authority both to grant membership in the Association and thus entry to the profession and to issue licences for those who are not members of the Association, in order that such persons may practise professional engineering in the province for a period no longer than "beyond the end of the calendar year in which the licence is issued."[22] Partnerships, associations of persons and corporations, under specified conditions, are also entitled to practise professional engineering under their own name provided that they possess a "certificate of authorization."[23] The Act itself and the regulations, and, insofar as members are concerned, the code of ethics and by-laws of the Council enable the profession organized to govern the professional practice of engineering vis-à-vis both those who are not members of the Association (or not licensed to practise) and for whom it is an offence to practise professional engineering and those who are recognized as professional engineers.

Regulations or by-laws of the Council are not effective until they have been submitted to the membership of the Association and approved by a majority (of those voting on a letter ballot).

Additionally, regulations are not effective until they have been approved by the Lieutenant Governor in Council. Finally, the Council's activities are financed entirely from the revenues of the Association.

Law

The legal profession, of the four in question in this study (and indeed of all professions in the province), has the longest standing as a self-governing profession. At present, this status is conferred by The Law Society Act on the Convocation of the Law Society, that is its governing council.[24] As the agent of the state for the purposes of governing the practice of law, Convocation is given the authority, by Section 55 of the Act, to make regulations, subject to the approval of the Lieutenant Governor in Council, "respecting any matter that is outside the scope of the rule-making powers specified in Section 54 (see below) and, without limiting the generality of the foregoing,

1. respecting any matter ancillary to the provisions this Act with regard to the admission, conduct and discipline of members and student members and the suspension and restoration of their rights and privileges, the cancellation of memberships and student memberships, the resignation of members, and the re-admission of former members and student members;

2. requiring and prescribing the books, records, and accounts to be kept by members and providing for the exemption from such requirements of any class of members;

3. requiring and providing for the examination or audit of members' books, records, accounts and transactions

and the filing with the Society of reports with respect thereto;

4. authorizing and providing for the preparation, publication and distribution of a code of professional conduct and ethics;

5. respecting the reporting and publication of the decisions of the courts;

6. defining and governing the employment of barristers and solicitors clerks;

7. respecting legal education, including the Bar Admission Course;

8. providing for the establishment, operation and dissolution of county and district law associations and respecting grants and loans to such associations;

9. prescribing the form of the summons referred to in subsection 10 of Section 33.[25]

Convocation, as noted above and also "subject to Section 55", has authority to make rules relating to the affairs of the Society and, without limiting the generality of the foregoing,

1. providing procedures for the making, amendment and revocation of the rules;

2. prescribing the seal and the coat of arms of the Society;

3. providing for the execution of documents by the Society;

4. respecting the borrowing of money and the giving of security therefor;

5. fixing the financial year of the Society and providing for the audit of the accounts and transactions of the Society;

6. providing for the time and manner of, and the methods and procedures for the election of benchers;

7. providing procedures for the election of the Treasurer, the filling of a vacancy in the office of Treasurer, the appointment of an acting Treasurer to act in the

Treasurer's absence or inability to act, and prescribing the Treasurer's duties;

8. providing for the appointment of, and prescribing the duties of the Secretary, one or more deputy secretaries and assistant secretaries and such other officers as are considered appropriate;

9. respecting Convocation;

10. providing for the establishment, composition, jurisdiction and operation of standing and other committees and delegating to any committee such of the powers and duties of Convocation as may be considered expedient;

11. governing honorary benchers, ex officio benchers and honorary members and prescribing their rights and privileges;

12. governing members, life members and student members, and prescribing their rights and privileges;

13. prescribing fees and levies for members and student members or any class of either of them, and providing for the payment and remission thereof and exempting any class of either of them from all or any part of such fees or levies;

14. respecting the Compensation Fund and prescribing the amount of the levy to be paid to the Society for the Fund and exempting any class of members from all or any part of such levy;

15. prescribing oaths for members and student members;

16. providing for the payment to the Society by any member of the cost of any investigation or audit of his books, records, accounts and transactions;

17. providing for, and governing meetings of members or representatives of members;

18. prescribing procedures for the call to the bar of barristers and the admission and enrolment of solicitors;

19. defining and governing the employment of student members while under articles;

20. providing and governing bursaries, scholarships, medals and prizes;

21. providing for, and governing extension courses, continuing legal education, and legal research;

22. governing degrees in law;

23. providing for and governing libraries;

24. providing for the occasional appearance as counsel in the courts of Ontario and before provincial judges, with the consent of the Treasurer and of the court or judge, of members of the legal profession from outside Ontario;

25. providing for the establishment, maintenance and administration of a benevolent fund for members and the dependants of deceased members;

26. prescribing forms and providing for their use, except the form of summons referred to in subsection 10 of Section 33.[26]

The rules made under the above, moreover, "shall be interpreted as if they formed part of this Act."[27]

Although The Law Society Act does not itself define the practice of law for purposes of the Act, Section 50(1) of the Act does prohibit those who are not members of the Society in good standing from acting, holding themselves out, representing themselves or practising as a barrister or solicitor, "except where otherwise provided by law."[28] As far as members are concerned, their practices are regulated by the Act, the regulations of Convocation and the code of professional conduct and ethics, the latter issued under the authority of Convocation as the 'Professional Conduct Handbook.'[29]

Convocation, as the governing council of the Law Society, is

composed of "benchers" whose responsibility it is to "govern the affairs of the Society, including the call of persons to practise at the bar of the courts of Ontario and their admission and enrolment to practise as solicitors in Ontario."[30] The benchers who comprise Convocation are of six types: (1) honorary, whose rights and privileges are prescribed by the rules of Convocation; (2) ex officio, whose rights and privileges are also prescribed by the rules of Convocation, except that, since 1971, they no longer have the right to vote in either Convocation or in any of its committees; (3) the Attorney General for Ontario and every person who has held this office as ex officio, but with the right to vote in Convocation and in any of its committees; (4) Treasurer (that is the president and head) of the Society and every person who has been elected to this office as ex officio, but with all the rights and privileges of an elected member until such a person reaches the age of seventy-five when that person will no longer have the right to vote in Convocation or any of its committees; (5) elected benchers, forty in number with twenty from Metropolitan Toronto and twenty from outside the same, who are elected every four years by secret ballot from and by the members in good standing of the Society; (6) appointed benchers, four in number who are not members of the Society with two from Metropolitan Toronto and two from outside the same, appointed by the Lieutenant Governor in Council and with all the rights and privileges of elected benchers. With

respect to the governing authority of Convocation, accordingly, only those with the right to vote can exercise the authority delegated to this body.[31]

Finally, the members of the Law Society possess a power of initiative with respect to the regulation and rule making authority of Convocation in that,

> If a resolution duly passed at an annual general meeting is not implemented by Convocation within six months of the annual general meeting, then, upon the filing with the Secretary of a petition signed by at least one hundred members in good standing of the Society requesting Convocation to do so, Convocation shall cause a mail vote on the resolution to be taken of all members in good standing of the Society, and, if at least two-thirds of those voting vote in favour of the resolution, Convocation shall implement the resolution to the extent that it is by law able to do.[32]

The four self-governing professions described above are similar in that in each case the authority to govern entry to and the practice of their profession is vested with the profession organized. In each case the profession is primarily, if not exclusively, responsible for the determination of the governing bodies which exercise the authority granted by statute. As such, a delegation of authority enables the four professions to exercise legislative, executive and judicial powers on behalf of the state for the purposes outlined in each of the enabling statutes.

Part II: Public Accountability - An Analytical Framework

3. Public Accountability: Concepts and Values

"Public accountability" is a term subject to much confusion. In constitutional theory it is a concept that specifies a relationship or complex of relationships whereby the state and its agencies are accountable to the public on the grounds that they are established in order to protect and promote the public's interests. In political philosophy it is a value that prescribes that those who exercise public authority, either directly or indirectly, be required to give an account of their behaviour to the public from which they derive their authority. In political practice it is a principle which gives concrete expression to the theoretical concept and the philosophic value in the structure and process of a political system. Three dimensions of our political system are relevant to our analysis of public accountability. They are the representative character of government, the location of responsibility for the administration of public policy, and the public interest in public policy.

Representation

Central to the rise of democratic institutions in our English-speaking world has been the demand that citizens be represented in the governing of public affairs.[33] This demand, as

articulated by the "modern" political science that accompanied the "democratic revolution", was an explicit rejection of the "good regime" as found in "classical" political science. The ancient formulation of the ideal political constitution presupposed that the justification of the state and the standards for a just order were to be found in philosophy or religion, not popular consent or opinion. Modern political science, however, sought to establish popular consent and opinion as the bases of the state and public policy.[34] At the same time, nevertheless, it rejected "democracy" for the same reason found in classical political science, namely that democracy is tantamount to "mob rule." Modern political science, in its efforts to establish the primacy of public opinion and consent, was compelled to discover a modern understanding of democracy.

The great discovery, so to speak, was the concept of "representation."[35] By way of a system of elected representatives citizens could be given an opportunity to participate in the determination of who would govern their policy. At the same time the body politic could be protected from the vulgarities and tyranny of mob rule because the rights of citizens were restricted to the selection of representatives. Citizens were not to govern directly; rather, the new political science upon which representative government is based constitutes a "science

of indirect government."[36]

The advent of parliamentary government as we know it was not a phenomenon that solidified our concept of representation, however. There were at the inception of the modern theory of representation a number of conceptual difficulties and not all were resolved simply by the application of the theory in practical politics. The difficulties which remained did not undermine the general acceptance of the concept of representation and indeed its basic principles have continually been extended in political practice. It needs to be recognized, nonetheless, that our systems of representative government do require more attention than they have received from the perspective of their "respective" character. For our purposes, this is especially the case in two important respects. The first concerns the relationship of the representative to those who are represented; the second, the relationships between representatives.

In the first instance, our theory of representative government does not imply that the representative is necessarily responsible for the way in which a political system is governed; rather, his primary responsibility is to represent the interests of his constituents in the processes of governing. To the extent that a representative is responsible for the actions or inactions of government, he is so in light

of the particular interests which he has sought to advance. Whether these interests are the interests of those he represents is a matter to be judged by his constituents individually. In representative government there are no *a priori* values which take precedence over the right of individual citizens to judge what constitutes their interests.

At the same time, however, our system of representative government assumes more than a single representative for the entire body politic. The relationships between our several representatives constitute the essential structure of our system of government. The way in which we have arranged this structure in parliamentary government has resulted in the emergence of political parties. Parties, it must be recalled, emerged first as a response to the structural requisites of parliamentary government; only secondarily did they become the electoral machines with which we identify today. Moreover, at their inception, parties were regarded by many as factious.[37] Yet logic required them if order was to be imposed on that very multiplicity of factious which government by a collectivity of representatives itself promoted.

The order that political parties bring to bear upon our system of representative government has made it possible for

individual citizens to select and then to assess their representatives in regard to the way in which they are governed. This is made possible by virtue of the fact that the administration of public affairs is primarily, if not exclusively, determined by a party with which some number of representatives (although not necessarily a majority) can be identified. Public policy, in other words, can be equated with the policy of the governing party. This policy can then be scrutinized and assessed by citizens in reference to their interests.

Political parties are important, even crucial, to the functioning of our system of representative government not just because they are a mechanism for the establishment and maintenance of political order and leadership. In addition, they enable citizens to participate in the selection of this leadership by way of the selection of their representatives. In each of these ways political parties help to accommodate, but not resolve, the theoretical difficulties extant in the concept of representation. The ways in which this accommodation affects public accountability is another matter, however. It is one that requires an examination of the other two dimensions of public accountability.

Responsibility

Neither the institutionalization of the concept of representation nor even the emergence of political parties, in themselves, ensured the realization of public accountability in governing. Further developments were required. In our tradition this took the form of what we refer today as the system of "responsible government."[38] It was the genius of the parliamentary system of government that from an essentially monarchical regime there could emerge a regime in which responsibility for "governing" is located within an elected assembly of representatives. In order to achieve this, a considerable amount of constitutional "fiction" has had to be maintained and, insofar as these fictions possess constitutional status, a certain degree of uncertainty has had to be accepted. In the process, nonetheless, the concept of responsibility for the governing of public affairs have led to our constitutional requirement that the executive branch of government, namely the Prime Minister and his Cabinet, not only be chosen from but also be responsible to the elected assembly of representatives. Both the legal basis of our constitution and the conventions of our party systems have given the Prime Minister the prerogative to select his Cabinet, that is to determine who shall constitute the Council of the constitutional head of state.[39] But the spirit of our constitutional system of

responsible government clearly requires that the executive be responsible to the elected assembly of representative for the exercise of its authority. It is equally clear, however, that the political science of our constitutional regime has not been sufficiently precise in explicating this spirit and to some extent because of this our practice of parliamentary government has not always conformed to this same spirit. In each case, there are several reasons - some well justified, others not so well justified - for these deficiencies and shortcomings respectively.

Our political science (using this term in its broadest sense) has been deficient to the extent that our understanding of the fundamental concepts and values which under lie our constitutional order has not been adequately advanced in light of both the changes that have taken place in our constitutional system and the demands which have been placed upon it.[40] In part this is obviously due to the widespread acceptance of our system of parliamentary government and our considerable pride in its obvious strengths. Whatever the reasons, it is clear that further clarifications and direction are increasingly required.

The shortcomings in our political practice of responsible government, on the other hand, have been the subject of an increasing concern for two reasons. First, within the

executive branch of government there has been the acknowledgement that, in too many respects and to too great a degree, elected public officials have had less than adequate executive capacity to direct appointed public officials for whose activities they are responsible. This is now well appreciated and there is no need here to dwell upon its several implications. Canadian governments in general and the Ontario government in particular have responded by initiating organizational changes and managerial reforms designed to enhance the capacity of elected officials to formulate and implement public policy.[41] Second, and for much the same reasons, governments have sought to establish greater executive control over those agencies of government that to date have enjoyed considerable independence from elected public officials. This effort has been applied particularly to those agencies whose functions are not primarily adjudicative in character.[42]

The phenomenon of independent agencies and special purpose bodies is not of course unique to our parliamentary system of government but it does impose a severe strain on the principle of responsible government. It does so, moreover, not just in practice (as the above concerns of elected public officials demonstrate), but also in theory. The theory of responsible government accepts the critical role played by political parties in giving effect to our system of representative

government. But, even if our constitutional law can accommodate independent agencies and special purpose bodies on the ground that their delegated authority can be removed at any time, our theory cannot afford to ignore either the spirit of our constitution or the realities of political behaviour. The spirit of our constitution requires that elected public officials exercise their responsibilities, unless it can be demonstrated that the public interest would not be served by such an exercise. An example of such an exception is the independence of our courts in the governing of our public affairs. Our theory can adjust for this kind of exception since not to do so would place too great a strain on other principles which underlie our constitution. At the same time, however, the realities of political behaviour make extremely tenuous the connection between our experience with delegated authority and the doctrine of parliamentary supremacy. Our theory can account for this discrepancy because it recognizes both the powers of the executive vis-à-vis the legislature and the exigencies of political support. But this explanation should not be employed as a justification for this shortcoming in our adherence to the principle of responsible government.

This shortcoming has received considerable attention in recent years not only because of the so-called "crisis of coordination" that has afflicted governments in the English-

speaking democracies but also because of the alleged decline in the legitimacy afforded these same governments.[43] The "accountability" of ministers, public servants, regulatory agencies, crown corporations and just about everyone and every group involved in the political/governing process has been called into question.[44] The current focus on "accountability", however, has yet to result in an adequate solution to the deficiencies for which there seems to be mounting evidence. In large part, our inability to develop the necessary solutions is due to our failure to relate our institutional arrangements for representation and responsibility to the ultimate purpose they are meant to serve.

Public Interest

The innovations in modern democratic thought and practice that resulted from the introduction of representative and responsible government constituted an acceptance of the principle of public accountability in the governing of public affairs. They did not in themselves, however, resolve a number of fundamental questions. As we have noted, a number of issues remain and neither political theory nor convention has yet resolved them. They have been compounded, moreover, by our relative inattention to them and by the exigencies that result from the increasingly critical role of the state

in our socio-economic affairs.

Central among the unresolved questions which relate to public accountability is the question of what constitutes the "public interest" in public policy? This question is central for the very reason that representation and then responsibility were introduced as constitutional devices in order to ensure that government be accountable to the public. Yet, as we have noted, representation, as the "indirect" option to "direct" democratic government, is predicated upon an understanding of public interest that gives paramountcy to the interests of the individual citizen qua individual. Responsibility, on the other hand, is limited to the relationships between the executive and the legislative branches of government in our parliamentary system.

In combination, the above-noted limitations have produced a situation where responsibility often means no more than the capacity of the executive to dictate what constitutes the public interest without meaningful reference to the assembly of elected representatives. At the same time, this capacity has been enhanced by the deployment of various devices to determine the interests of citizens directly; that is, by by-passing the elected representatives of citizens. That the latter approach has been assumed more successful than not is no doubt a comment on the capacities of representatives to

perform their representative functions.[45] Notwithstanding the utilities of such innovations to the executive branch of government, they also introduce significant disutilities. Chief among them are two obstacles to public accountability as it must be achieved in our particular system of constitutional government. These two obstacles are related but will be treated, at the outset, separately.

The first of these obstacles is the obvious incentive for a government to avoid as much as possible the dissemination of information except on its own terms. This incentive is twofold. In the first place, the executive, as the party in power, has an interest in ensuring that only that information which promotes or does minimum damage to its support by the electorate is released to or obtained by this same public. As a consequence, governments have not been inclined to open for public inspection and scrutiny the "inner workings" of public administration. In the second place, the complexities of public administration, due in large part to the increasingly interventionist and activist functions performed by the state, have created a situation where elected public officials must accept responsibility for activities which not only are performed by a virtual army of appointed public officials and a plethora of quasi-independent agencies but over which they have restricted management authority. It is not surprising that the elected executive is not anxious to

extend the amount of information that is released by or obtainable from these centres of public administration. To some extent, accordingly, the executive finds itself caught in a circle for which it might be excused for considering vicious.[46]

The second obstacle that restricts adherence to public accountability is the lack of a significant capacity on the part of our legislatures to scrutinize and evaluate public policy and administration. In part, the capacity of our legislative assemblies to perform these functions is limited by the factors discussed above in reference to the first obstacle. In addition, and perhaps more importantly given that the first obstacle may be largely the result of the second, there is our failure to appreciate sufficiently the fundamental role that legislatures must play if public accountability is not to be another constitutional facade. Specifically, we have not paid the necessary attention to the purposes of our representative assemblies beyond their obvious legislative functions. Legislatures have not been confined to its legislative functions, it is clear; yet the capacities of representative assemblies to deliberate have been too little advanced over the past several decades for them to cope with either the expansion of the public policy agenda or the complexities of public administration. These assemblies have not been afforded, to the degree necessary

and within our resources, the staff, facilities or opportunities to perform their deliberative functions. "Reforms" in the legislative arena, although for some purposes useful, have too often been misplaced or token.[47]

What is most crucial is that we have not sufficiently acknowledged the importance of legislative deliberation to the accountability of the state to its public. Rather, we have assumed that public accountability is somehow to be equated exclusively with representation and responsibility. Accordingly, we have considered the state to be accountable because the executive is responsible to the legislature, the legislature must be elected within a fixed period of time and, therefore, what the state does is subject to the judgement of the public. We have failed to recognize with sufficient clarity that our system of representative government assumes a relationship between the representative and the citizen that obtains only when the citizen is afforded the best possible opportunity to assess what the state does or does not do. It is only to the extent that 'the best possible opportunity' is secured that the state can be said to have abided by the principles of public accountability. The state, in other words, must attempt to ensure that every feasible effort is made to demonstrate publicly that its actions or proposals are in the public interest. Without demonstrations of this kind,

our mechanisms for public accountability amount to little more than crude measures of public support for the party in power.

The interpretation of public accountability presented above, is not put forward in the absence of a recognition of either the complexities of governing or the accomplishments of our governing traditions. Rather it is to suggest that, insofar as the structures and processes of governing are concerned, our system of government has been organized and managed in ways that have placed insufficient emphasis upon one of the essential requirements of public accountability.

Two points must be made with respect to the above interpretation. First, nothing in the above should be construed as a suggestion that the public policies of any Canadian government are not undertaken in the public interest. This question has not been our concern. Second, our preceding discussion ought not to be interpreted as an attempt to establish a definition of the "public interest", except insofar as it is assumed that our insistence that our governors be accountable to us is in our public interest. On the contrary, the point of the above discussion is that the structures and processes of our governments are designed to accomplish two purposes, namely, to provide for an efficient and orderly administration of public affairs, and to establish a particular kind of

representative government in which our representatives act as our agents, that is with authority to act on our behalf. And, in order to best guarantee that our interests will be the principal concerns of our governors, we have provided mechanisms to make them accountable to us. We have sought to ensure, in other words, that they demonstrate that what they have done or propose to do will advance our public interests. It needs to be emphasized that we have not prejudged what policies are in the public interest.

4. Public Accountability: Principles for Self-Government

Nothing in the preceding analysis is meant to suggest that the delegation of authority by the state to a profession organized for self-government contradicts the fundamental requisites of public accountability as they pertain to parliamentary government. At the same time, however, it is clear that certain conditions must obtain if this approach to the governing of professions is to satisfy these requisites. In this chapter these conditions are outlined. These conditions will then be used as the criteria for the evaluation of the present arrangements for the governing of the four professions that constitutes Part III of this report.

The Structures of Self-Government

In Chapters 1 and 2 we noted that a self-governing profession is one in which authority for governing a profession is delegated by the state to the profession organized. Central to this delegation of authority is the need to ensure that there is a clearly established pattern whereby some group is designated responsibility for this exercise of authority.

The first condition which must be met if public accountability is to be obtained with respect to the above is that the statutory instrument establishing a self-governing profession be sufficiently specific in regard to not only the composition of the governing body, its numbers and character, but also the processes whereby its membership is determined. It follows that the state must establish structures that seek to encompass the broadest possible consideration of the public interests in the governing of a profession. As such, these structures should not be composed entirely of representatives of the organized profession but also include members chosen to represent, in particular, those public interests which are affected by the rules of the profession itself. It must be emphasized here that this is <u>not</u> to suggest that the representatives of the organized profession are not also responsible for exercising their authority in the public interest. Rather, it is to suggest that it is appropriate

to include persons whose particular responsibilities are to ensure that interests other than those of the public qua client are also considered, assuming that the profession is best qualified to consider the interests of the public in this latter respect.

The above point is emphasized precisely because there has been exhibited, in recent years especially, some confusion as to the role of self-governing professions in the protection and promotion of the public interest. Two examples of this confusion merit attention.

First, no less an authority on self-governing professions than the McRuer Commission commits a common error in interpreting the responsibility of the self-governing professions to "safeguard" the public interest.[48] The report of this Commission states that, although "the public interest may have been well served by the respective (professional) bodies which have brought to their task an awareness of their responsibility to the public they serve, ...there is a real risk that the power (of self-government) may be exercised in the interests of the profession or occupation rather than in that of the public." The Commission's report then argues that such a risk "requires adequate safeguards to ensure that injury to the public interest does not arise." Although there are many

recommendations in its report which relate to such safeguards, the Commission, immediately after making the above statements, recommends that "lay members should be appointed by the Lieutenant Governor in Council to the governing bodies of all self-governing professions and occupations."[49]

The 'common error' in the above is that the McRuer Commission, on this point, not only has cast doubt on the value of self-governing professions by insisting that the state obtain a second agent to police its principal agent, but has done so in a way that misses the point concerning the need for additional agents of the public interests in the governing of the professions. The need for members on the governing body of a self-governing profession who are not members representative of the profession is a result of the complex public interests affected by the governing of a profession. Not only clients and professionals are affected by the way in which a profession is governed; third parties are also affected, be they third parties as is commonly understood by that term or third parties such as professionals in related fields, aspiring professions or allied personnel. In addition, there are other public interests for which the governing of a profession has consequences; the cost and distribution of professional education and services, for example.[50] For any or all of these reasons, the state should consider it in the public interest to have the governing bodies of professions

composed of more than the representatives of the professions. In so doing, however, the rationale ought not to be that the state does not "trust" the representatives of the profession. There are other and much more effective and even required instruments at the disposal of the state to ensure that the trust which it has placed in these representatives is justified.

A second confusion concerning the protection of the public interest, and that which provokes the kind of recommendation noted above in our comment on the McRuer Commission, is the seldom explicit but often implicit assumption by professionals that they possess a "right" to self-government.[51] This claim to a right of self-government inevitably gives rise to a false debate over whose rights and therefore interests - the profession's or the public's - are served by self-government. In the context of our constitutional regime, as the McRuer Commission properly notes,

> The granting of self-government is a delegation of legislative and judicial functions (read, authority) and can only be justified as a safeguard to the public interest. The power is not conferred to give or reinforce a professional or occupational status. The relevant question is not, "do the practitioners of this occupation desire the power of self-government?", but "is self-government necessary for the protection of the public?"[52]

This claim to a right of self-government does harm to the concept of self-government because it ignores the delegation of authority which is not only legally established but which

is the fundamental raison d'être of a self-governing "profession." If professionals fail to appreciate this concept of delegated authority, then public confusion and a lack of appreciation are bound to follow.

The second condition which must be met in regard to the structures of self-government is that the organized profession must both organize itself and demonstrate its capacity to provide personnel, resources and staff for the exercise of the authority delegated to it. While in one sense this is assumed by the delegation of authority to a profession organized for self-governing, the profession so organized has a responsibility to ensure that its capacities and commitments are sufficient for it to carry out its assigned functions and the state has a duty to hold its agency accountable for this responsibility. This condition is especially critical because it is the duty of the organized profession to distinguish clearly between its responsibilities as agent of the state and whatever responsibilities it considers itself to have to its professional constituency.

The Processes of Self-Government

In the foregoing discussion the concept of agency was introduced in order to emphasize two points. The first was that the profession organized must be considered the state's agent for the promotion of the public interest in the governing of the

practice of a profession. The second was that for certain other public interests the state should select additional "agents" to serve on the governing boards of self-governing professions. The concept "agent" in this respect is obviously not used in as strict a meaning as it is in the first instance. Nevertheless, if the major values of self-government are to be preserved it is necessary that the agency principle be maintained.

At the same time, the exercise of this delegated authority must be subject to the ultimate authority from which the delegated authority emanates in the first place. Given the values and concepts of our system of parliamentary government, the relationship of the self-governing professional to the state must be subject to a particular set of conditions.

The first of the two most important conditions is that the executive branch of government, that is the Lieutenant Governor in Council, must be considered responsible for the exercise of the authority that is delegated to the self-governing profession. The constitutional principle upon which this condition is predicated is the need to have the executive exercise the executive powers that are inherent in parliamentary government. There cannot be, in other words, a true "separation of powers" in the form of a delegation of legislative authority from parliament to an agency which is "independent" of the executive.

It follows, accordingly, that approval by the Lieutenant Governor in Council of the legislative actions of a self-governing profession constitutes a primary condition of public accountability.

The legislative process that occurs within the context of a self-governing profession thus must involve two separate procedures. On the one hand, the self-governing agency must establish the rules, regulations and standards which will govern its profession; on the other hand, the executive branch of government must assess these proposals and decide whether or not to approve them. In one sense, it might appear, the executive has the power to "second guess" its agent. This interpretation should not be imposed on this process of approval because the executive is <u>not</u> given the authority to impose its own legislation; it can only withhold approval.

The responsibility of the executive cannot be restricted simply or exclusively to the legislative powers which have been delegated to a self-governing profession. It must also be responsible for the executive decisions taken by a self-governing profession. It must be so because review and assessment of the consequences of rules, regulations and standards are essential functions of the executive. This is not to say that the executive has a responsibility to intervene in administration. Rather, in this case, it implies

that the executive must be responsible for evaluating the actual behaviour of the state's agency.

The above requirements constitute the first condition of public accountability in self-government. They do not exist in isolation, however. On the contrary, they are a fundamental component of a system of parliamentary government in which another condition of public accountability must prevail. This second condition requires that the executive be responsible to the legislature for its administrative actions vis-à-vis self-governing professions. What this second condition requires for self-government is twofold.

First, the executive must be responsible to the legislature for those rules, regulations and standards which it approves and which it does not approve. In other words, the executive must give an account to the legislature that demonstrates why it has or has not granted approval to the proposals of a self-governing body. Such an account is necessary if the legislature is to pass judgement on the value of the proposals of the state's agent. This is especially crucial where the executive is at odds with the judgement of the agent since it is an act of the legislature that establishes self-government.

Second, the legislature must be afforded the opportunity to pass its own judgement on the actual consequences of the

decisions taken by an agency of self-government as the result of rules, regulations and standards which have received approval. Hence, there is a need for a review and assessment by the executive for the legislature on the same.

The responsibility of the executive to the legislature in the above two regards is critical to the preservation of self-government because without it one of two circumstances is likely to prevail, neither of which can be justified. The first is straightforward. Without this responsibility there can be no pretence of public accountability since the principle of responsible government is not being upheld; the agent, so to speak, is on its own to do as it pleases.[53] The second is more complex. Without the above prescribed responsibility, there will likely occur either a partial or complete demise of self-government. The former would involve the granting powers to an executive agency separate from the self-governing body to impose rules, regulations or standards upon a self-governing profession. This situation now prevails in the Province of Quebec insofar as the Office of the Professions has the power to issue regulations on its own initiative.[54] The latter occurrence would involve the creation of an executive agency to govern a "profession." In this case a delegation of authority by the state to the profession organized would not take place; the "professional"

character of the profession would thus be removed. This was preferred but not, for the most part, recommended by the Ontario Committee on the Healing Arts for the health professions.[55]

In order to preserve the regime of self-governing professions responsibility must rest with the executive; but the legislature must insist upon restrictions to the authority invested in the executive. This situation can be obtained only if the legislature, and not the executive, can effect changes in the governing of a profession. Accordingly, even though it is necessary that the executive approve the legislative proposals of a self-governing body and evaluate its administration, the ultimate authority to establish rules, regulations or standards should remain with the legislature to be exercised _via_ legislation. In this way the authority to delegate authority is recognized as belonging only to the legislature and, equally important, the concept and value of self-government are preserved.

Finally, in order that the arrangements for self-government reflect the essential character of the agency relationship, it is necessary that the membership of an organized profession be afforded a role in the processes of self-governing. What is required here are mechanisms to ensure that the collective judgement of the profession is brought to bear

upon questions of policy. Specifically, the membership, in addition to their right to select those who represent them on the governing bodies of their profession, should possess a capacity to approve, initiate or otherwise participate in the determination of the policies adopted by governing bodies. The need for such a capacity is inherent in the very concept of a self-governing profession inasmuch as professionals are neither the "employees" of the agency to which authority has been delegated nor merely the "subjects" of this agency. Rather, they are parties to the agency relationship which is established between the state and their profession. Their right to participate in the determination of policy is a consequence of their agreement to subscribe to the rules and norms which govern their professional activities.

The Public Interest in Self-Government

However much an act of the legislature is confined to a particular class of individuals, the action of the legislature assumes that a public interest is served. The statutes which establish self-governing professions assume, in other words, that it is in this manner that the public interest is best preserved and promoted. In addition to the suggestions in our preceding discussion, there are two further conditions which must be met if the public interest in the governing of professions is to be demonstrated according to the

requirements of public accountability.

The first condition is that the executive be sufficiently informed of the decisions and activities of the self-governing professions in order that it might assess and evaluate them. This requires that the necessary information be forthcoming from these agencies and, equally important, that the executive possess the capacity to perform these functions. The latter is especially critical if the executive's responsibilities are to be met in the spirit, and not just the letter, of our constitutional system.

Given that a major responsibility for the governing of professions has been delegated to the profession, this requirement is not an easy one to meet. The expertise, in large part, is to be found in the very agency to be reviewed. Moreover, to the extent that the activities of many professions cut across the concerns of the executive branch of government, this review function introduces difficult organizational questions. Nonetheless, the responsibility of the executive to approve or disapprove the proposals of a self-governing profession and to defend its decisions in the legislature require this capacity.

This capacity is required precisely because the public interests in the governing of professions are not limited

exclusively to questions which result from the practice of professionals vis-à-vis their clients. The public interests in third party and socio-economic impacts need to be identified and considered in a larger, albeit often a less precise, context of public policy.

The need to demonstrate the public interests in public policy and administration gives rise to a second condition. Since it is the legislature that delegates authority to self-governing professions in the first place, the legislature must attempt to ascertain the degree to which public interests are or are not served by the exercise of delegated authority. It must do so with respect to the decisions and activities not only of the self-governing profession but also the executive, since the latter has responsibilities for the former to the legislature. The efforts of the legislature to achieve the above objective are crucial if it is to ensure that the public is provided a public account of the exercise of delegated authority. Only on the basis of such an account can the body politic assess the public interests which are protected and promoted by public administration. To the extent that legislatures succeed in performing this public accounting of the public interests in public policy the principles of public accountability are upheld.

Quite clearly, of course, the performance of this function is

both difficult and costly. It is difficult not only for the reasons noted in regard to executive review, but also because our legislatures have only recently begun to recognize the need for a more rigorous and thorough evaluation of public administration. However, legislatures often lack the information base required to perform these functions and, in addition, have little in the way of support staff and facilities without which much of the information that they do obtain is of limited use.

We have already discussed two of the major reasons why this situation exists; first, the impact that parties have had on the structures and processes of the legislature and, second, our failure to recognize the importance of representative assemblies in governing. Moreover, we must also note that much confusion, intentional or otherwise, has been introduced by the political exigencies which so often accompany the exercise of delegated authority. This confusion emanates from the widely held opinion that the deployment of this instrument should create an arms-length relationship between the government and the agency to which authority is delegated.[56] It follows that government should maintain a "hands-off" position vis-à-vis such agencies and, except in extreme circumstances, should not even question the exercise of the authority so delegated.

In certain circumstances, given the different functions performed by agencies with delegated authority, this opinion has some justification. In general, however, the opinion that authority once delegated by the state is authority removed from the state undermines the principles of public accountability which demand a public demonstration of the public interests in public policy.

If there is to be public accountability in the self-governing of the professions, our legislatures must develop the capacities necessary to provide a public forum where the public interests in the self-government of the professions can be satisfactorily demonstrated. The values and concepts of self-governing professions require that such a public accounting be undertaken with the greatest possible effort.

Finally, it follows that for a public accounting to be effective, those for whom this exercise is undertaken, namely the body politic of citizens, must have a right to obtain the information necessary if its assessment of the public account is to be realized in any important sense.[57] If the relationships between the legislature, the executive and the self-governing profession are as they should be, our system of representative government ought to generate most, if not all, of the requisite information. At the same time, however, it is in the spirit of our constitutional system that citizens

not have to depend exclusively on the processes of government. That we have not always abided by this spirit in our practice of government in no way detracts from its importance as a fundamental principle of public accountability in representative government.

Part III: Present Arrangements for Public Accountability

5. The Structures of Self-Government: Composition and Representation

As noted in the Introduction, Part III of this report examines the present arrangements for self-government in the professions of accounting, architecture, engineering and law. This examination is restricted to these arrangements as they pertain to the principles of public accountability in self-government. Its focus is public accountability in the governing of the professions and not the accountability of professional practitioners to their clients. Secondly, although an attempt is made to interpret the rationales and understandings which inform the present arrangements, except as they relate to the question of public accountability, no attempt is made to infer what consequences these arrangements have had in other respects, however important or disputed they may be.

The above introduction to Part III is presented as an introduction to this chapter on the structures of self-government for the simple reasons that structure clearly constitutes the initial question in the establishment of a self-governing profession. As noted in Chapters 1 and 2, however, there is not uniformity in the self-governing arrangements for the professions in question. For this reason the four professions will be treated separately.

Accounting

The governing of the professional practice of public accountancy presents perhaps the most complicated case of self-government. It does so precisely because the Public Accountants Council, although primarily responsible for the exercise of the authority delegated to the profession, stands in some important respects apart from the profession organized. It does so in two ways. First, it is composed of two sets of representatives: those selected by the Institute of Chartered Accountants of Ontario and those elected by and from licensed accountants who are not members of the Institute. The profession organized, in other words, is not organized as one "body politic." Second, there is a "qualifying body," namely the Institute, which constitutes a second, and for the greater part not a second order, governing body. At the same time, however, this body does not encompass all those licensed to practise public accountancy.[58] From the perspective of public accountability in self-government this structure has positive and negative characteristics.

In the first place, the Public Accountants Council is an agency independent of the organization of the profession. In this sense, it is clearly the agent of the state for the purpose of exercising the authority delegated to it. To

this extent, it "organizes" the profession of public accountancy as a body politic of licensees. On the other hand, this Council is clearly too independent of the profession organized. It is so in two important respects. First, the Institute as the "qualifying body" is primarily responsible for the establishment and application of qualifications for a licence from the Council. The latter must perform some functions in relation to qualifications, over and above those performed by the Institute, but these are undertaken as a result of certain "other" kinds of qualifications for a licence. Second, and perhaps more important, the Council, for all practical purposes, is concerned almost exclusively with matters which relate to the licence to practise public accountancy. This includes the process whereby applications for licences are considered and granted (or not granted) and the enforcement of the Act and the regulations made under it. In one sense, of course, these are among the most serious obligations of the Council. In another sense, the Council has confined itself to a role which, however necessary, constitutes only one dimension of self-government. This is largely the result of the Council's relationship to the Institute. In this instance it is not due entirely to the Institute being the qualifying body but rather is due to the de facto circumstance whereby the Institute is the profession organized for the vast majority of licensed public accountants. The Institute,

in other words, constitutes the profession organized both as the qualifying body and as the organizing instrument whereby twelve of the fifteen members of the Council are selected. Just as important, it also is the instrument that organizes the vast majority of licensed public accountants to serve in the administration of the affairs of public accountancy. In order for the Institute to perform its functions, it must serve as this organizing instrument. The Council does not possess this capacity, nor has it sought to develop such a capacity.

The major result of the above situation is that the profession organized has been governed in a less than satisfactory manner. The Council has performed its functions according to a narrow interpretation of its duties and the organized profession, as governed by the Institute, has been subject to differing interpretations of professional norms in some areas. This state of affairs is not in the public interest: the required, and possible, degree of public accountability which ought to be observed has been undermined insofar as the structures and processes of self-government are concerned.

The above state of affairs is not in the public interest primarily because the de jure division of authority and responsibility has resulted in a de facto role played by the Public Accountants Council that limits its capacity not only

to perform its statutory duties but also to provide the kind of self-government that is possible (given that the Institute has managed to do so) and desirable. The state has a responsibility to ensure that the structures of self-government reflect the greatest possible capacity for governing in the public interest. In this case it has not done so.

A second deficiency in the present arrangements is that the Public Accountants Council is composed exclusively of licensed public accountants. There are no members selected to represent those other public interests which might be affected by the way in which this profession is governed. Secondly, there are no statutory provisions nor regulations of the Council which provide for the representation of the profession according to geographical or other considerations. In practice, the Council of the Institute, in selecting the twelve members who are appointed by it, does attempt to obtain representation by region and type of practice. Finally, it should be noted separately, even though it is mentioned above and elsewhere, that these twelve members of the Council are not elected by the membership of the Institute. It perhaps should be added, however, that the Council of the Institute is an elected body.

Architecture

A second approach to the self-governing of a profession is

found in the governing of the profession of architecture. Here there exists a governing body within the professional organization of the profession organized, namely the Registration Board "of" the Ontario Association of Architects. This approach provides for an integration of this agency with the organized profession such that it has the capacity to mobilize the profession to perform its functions. Given that there is an explicit separation of the Registration Board and the Council of the Association, the provisions governing the composition of the former are different than those of the latter. The Board is composed of university representation, members elected by the membership of Association and an appointee of the Lieutenant Governor in Council; and all must be members of the Association. The Council of the Association is elected, largely on the basis of regional representation.

The relationship of the Board to the Association is clearly one that provides the architectural profession with a self-governing capacity. Moreover, the composition of the Board is such that provision is made for representation by means other than election by the Association membership. Notwithstanding the fact that both the university and Lieutenant Governor in Council appointees must be members of the Association, there is the opportunity for different perspectives on the public interests to be brought to the

deliberations and decision-making activities of the governing body. The provisions for the elected membership of the Board, unlike the provisions for the composition of the Association's Council, do not demand a recognition of geographical, type of practice or other factors.

The actual division of functions between the Board and the Council of the Association, although established in such a way that the Board possesses the capacity to undertake its assigned function, does create a division whereby the Board is primarily a licensing, qualifying and regulatory body. The Council of the Association, on the other hand, is assigned those functions which pertain to the development of the profession of architecture. As the Board "of" the Association, the Board must share in the pursuit of the objects of the Association which include "to advance and maintain a high standard in the practice of architecture in Ontario." Moreover, it is the Board of the Association which grants membership in the Association. Nevertheless, it is not clear in the present statute that the Board is responsible for other than its regulatory functions as outlined in Chapter 2. As such, its agency role with respect to the governing of the profession is somewhat negatively stated.[59]

Engineering

A third approach to the governing of a profession is exhibited in the profession of 'professional' engineering whereby the Council of the Association of Professional Engineers of the Province of Ontario is delegated authority both to regulate the practice of professional engineering in particular and to govern the profession generally. In this case, there is an even greater integration of the agency of the state and the profession organized.

The composition of the governing agency in this profession is such that the profession itself elects the majority of councillors (sixteen of a prescribed twenty-one, a possible twenty-three). Moreover, ten are elected from five regions of the province. In addition, the membership elects directly the president and two vice-presidents (and therefore the immediate past president) annually. A second kind of representation is afforded by the appointment by the Lieutenant Governor in Council of specialists in five fields of engineering. Finally, the Lieutenant Governor in Council may establish a third kind of representation by appointing a person who is not a member of the Association and who is a lawyer ("a barrister and solicitor of at least ten years standing at the bar of Ontario"). This composition affords the representation of a broad range of public interests in

the governing of professional engineering.

Two points should be raised with respect to the above arrangements. In the first place, the Council of the Association is given the authority to pass by-laws governing, among other matters, aspects of the system of representation and electoral procedures which, as by-laws, are considered the "administrative and domestic affairs of the Association." As such, the composition of the agent of the state is in part determined by the agent itself, a situation which either ought not to prevail or at least ought to be subject to the approval of the state. Secondly, the provision for councillors who are not elected nor appointed as specialists in the various fields of engineering is permissive ("the Lieutenant Governor in Council may appoint"); it is not required that they be appointed. In order to give full recognition to the concept and value of this kind of representation, more than a permissive clause is required.

Law

The governing of the legal profession in Ontario represents the classical model of a self-governing profession. It does so insofar as the organization of the profession for the purposes of self-government has long been distinct from the organization of the profession for other purposes. The

governing body of the Law Society, namely Convocation, is both the agent of the state for the exercise of delegated authority and the executive council of the organization. There is, accordingly, an integration of the agency and the profession such that the former can mobilize the latter for the performance of those functions required by a self-governing profession.

The composition of the governing body of the profession is more complicated than that found in the three professions discussed heretofore. There is recognition of the right of the membership to elect members to the governing body and, in addition, a principle of geographic representation is recognized. Forty benchers, as they are called, are thus elected; twenty from within and twenty from outside the Municipality of Metropolitan Toronto. Secondly, the provincial Attorney General and everyone who has held this office is ex officio a bencher and the Attorney General "shall serve as the guardian of the public interest in all matters within the scope of this Act or having to do with the legal profession in any way."[60] Thirdly, the Lieutenant Governor in Council "may" appoint four persons who are not members of the Law Society, with the above-noted principle of representation applying here also. Finally, there are a host of ex officio members including the Minister of Justice and Attorney General for Canada,

the Solicitor General for Canada, and all past Treasurers. Only the latter and the Attorneys General have the right to vote. Convocation can also appoint honorary benchers.

The "democratization" of the Law Society which has been effected in recent years has diminished the numbers and roles of those who are not elected or appointed to Convocation but a number of questions remain.[61] The two most important from the perspective of public accountability relate to the position and role of the Attorney General and the permissive character of the section relating to the appointment of non-members. In the first instance, the designation of the Attorney General as a bencher who is to be the "guardian of the public interest" contradicts the very value of a self-governing profession. At the very least, it implies that Convocation's purpose is other than the pursuit of the public interest in its exercise of the authority delegated to it. Secondly, it undermines the concept of delegated authority in that it assumes that the presence of the state is required in order to protect the public interest. Thirdly, it might also be taken to imply that other measures for the promotion of the public interest, such as the requirement that the Lieutenant Governor in Council approve the regulations of Convocation, are not effective. Finally, and this raises the second major question, it introduces a measure of confusion as to the roles of those benchers who are not

members of the Society. Are they not also to protect and promote the public interest and, if so, are they considered second-class guardians? Additionally, as was noted in our consideration of the composition of the Council of the Association of Professional Engineers, the permissive character of these non-member appointments does not give full recognition to the requirement that an agency of the state include the widest possible representation of public interests.

A second concern in this case relates to the powers of Convocation. As is the case in the governing of the engineering profession, the governing body of the legal profession is granted authority to make rules which do not require the approval of the Lieutenant Governor in Council but which do affect the composition and functioning of Convocation. As was suggested previously, this is contrary to the proper relationship that ought to exist between the state and its agent.

6. The Processes of Self-Government: Authority and Responsibility

The exercise of authority by an agent of the state under the instrument of delegated authority does not imply that such

authority can be exercised independent of any constraints. Rather, our constitutional system requires that the executive - the Lieutenant Governor in Council - be responsible for the exercise of this authority even if an agent is utilized for the same. On the other hand, our constitutional system demands that this responsibility not infer an authority to legislate as if the authority so delegated had been granted to the executive. The concepts and values of delegated authority are undermined if the executive possesses discretionary authority for the simple reason that responsibility then becomes diffused and/or uncertain. On the contrary, the power to legislate, except when clearly delegated to an agent, should remain with the legislature.

The present arrangements for the self-governing of the four professions in question exhibit both a number of variations and some shortcomings. These include the relationships of the governing bodies of these professions to the executive, the role of the memberships of these professions in the formulation of policy and, finally, the distinctions which are made between matters of policy on the one hand, matters of administration on the other. Each of these will be treated in turn.

First, there is an obvious variation in the relationships of the governing bodies to the executive in that three of these

bodies must obtain the approval of the Lieutenant Governor in Council for their regulations. This is not the case in the field of public accountancy. What is lacking here is twofold.

The most particular shortcoming concerns the processes of self-government in the field of public accountancy. On the one hand, the regulations of the Public Accountants Council are not subject to the approval of the Lieutenant Governor in Council; the latter may annul any regulation made the Council under the Act but there is no requirement that they be submitted for approval. On the other hand, they are not contained in the statutory regulations of the province nor, as a result, are they published in the Ontario Gazette. These arrangements, or lack of them, are clearly deficient according to our principles of public accountability.

A second, and related, point concerns the variation that exists with respect to the role of the membership in the legislative processes of the four professions. A regulation of the Council of the Association of Professional Engineers, for instance, is not effective until it has been approved by the Lieutenant Governor in Council, and

> it has been submitted to the members for approval by means of a letter ballot returnable within thirty days after the mailing thereof and it has been approved by a majority of those voting within the prescribed time.[62]

None of the other three professions provide their memberships with the right to vote on a regulation. The membership of the

Law Society, however, does possess, under the "rules" of Convocation, a power of initiative. This was outlined in Chapter 2. In neither the professions of public accountancy nor architecture do the memberships have such a right or a power. It is worth repeating, however, that for regulations of the Public Accountants Council to be valid they must be "approved by the votes of at least three-quarters of the members present and voting thereon."[63]

Each of the above situations provides some assurance that the governing bodies of the professions will be responsive to opinion and judgement within their respective professions. Although both the right of approval and the power of initiative are different means to this end, together they amount to a very effective set of instruments. In combination, and according to their formulation in the Professional Engineers Act and the Rules of the Law Society respectively, they provide an orderly and efficient approach to this question.

The third point where variations and shortcomings occur involves a matter raised in the preceding chapter. It is of sufficient importance that it be raised again. It concerns the distinction between the authority to make regulations which require the approval of the Lieutenant Governor in Council and the authority to make regulations, rules or

by-laws which do not require this same approval. The importance of this distinction has been a longstanding concern to those committed to the principles of public accountability in self-government. The Report of the McRuer Commission, for example, devotes a single, albeit brief, chapter to this question.[64] The governing bodies of three of the four professions under examination; namely architecture, engineering, and law, are able to act in a legislative manner without the approval of the Lieutenant Governor in Council in respect to matters that in some important respects are clearly of a policy, and not a domestic or administrative, nature. Almost all the "regulations" of the Registration Board of the Association of Architects which do not require this approval fall within the realm of policy; indeed only "disciplinary regulations" are subject to the approval of the Lieutenant Governor in Council. The "rules" made by Convocation of the Law Society are concerned, for the most part, with administrative matters but some do govern matters such as the election of benchers and the annual general meetings of the Society. Furthermore, these rules "shall be interpreted as if they formed part of this Act." The power of initiative, it will be recalled, is found not in the Act by in the rules made under the Act. Similarly, the Council of the Association of Professional Engineers has authority to pass "by-laws" which deal with such matters as the elections of councillors and executive

officers and the definition of regions for electoral purposes. In all of these instances there is need of a more rigorous interpretation of what constitutes policy on the one hand, administration on the other; and, for those matters which are not clearly in the latter category, the bias should be to include them in the former.[65]

7. The Public Interest in Self-Government: Information and Evaluation

In the two immediately preceding chapters the description and evaluation of the present arrangements for self-government were limited to those characteristics which relate most obviously to the principles of public accountability. As such, very little analysis accompanied that description and evaluation. In this chapter the foci will include not only the present arrangements as they relate to procedures for demonstrating the public interest in self-government, but also the underlying assumptions on which these arrangements are predicated. Three major areas are singled out for analysis: first, the responsibilities of the executive to the legislature; second, the review and evaluation functions of the legislature; and, third, the publication of and access to information concerning the self-governing professions.

The first major area of concern involves two dimensions of the responsibilities of the executive to the legislature. In the first instance, if the executive is to exercise its responsibilities for self-government then it is necessary that appropriate procedures be established to review and assess the regulations submitted by the governing bodies of the professions. Secondly, it is necessary that the executive possess the capacity to perform these functions.

The procedures currently in place for executive review and assessment involve the Ministry of the Attorney General, the Regulations Committee of the Cabinet and the Cabinet (acting as the Lieutenant Governor in Council). As we have already noted, the regulations of the Public Accountants Council, albeit few in number, do not proceed through this system; they do not require executive approval. The regulatory initiatives of the other three professional bodies do conform to the procedures which are meant to encompass all regulatory bodies. In the case of these professions, then, there are formal procedures for executive approval. But, the Ministry of the Attorney General does not participate in this process to any significant extent. For the most part, it has acted as the conduit whereby regulations submitted by the three governing bodies are channelled to the Regulations Committee of Cabinet. Although, for obvious reasons, it does have more to do with the Law Society, the Ministry does not see itself as other

than a possible support agency to these governing bodies; that is, providing advice on the draft formulation of regulations. The Ministry would have greater participation, again for obvious reasons, in any revisions to a statute.

The reasons why the Ministry has not intervened more directly are relatively straightforward. On the one hand, the Ministry has not considered itself responsible for the self-governing professions whose statutes are the responsibility of the Attorney General except as it is necessary to ensure that the authority delegated to these agencies is exercised within the scope delineated in their respective statutes. It also participates in any revisions to these statutes. The former exception is a function of general statutory oversight. The latter is a function of the Attorney General's duties to prepare legislative proposals for the legislature. The oversight function has been confined as noted above; the legislative function has been performed exclusively in response to initiatives from the professions themselves. Until the establishment of the present enquiry, in other words, the Ministry did not regard the initiation of proposals as its responsibility. In this sense the policy perspective of the Ministry has been that self-government implies that "professional" matters are to be left to the professionals. On the other hand, the Ministry does not possess (or does not perceive itself to possess) the expertise

to do other than assess the legality of the actions of the self-governing agencies and assist in the drafting of revisions to their enabling statutes. This state of affairs is most evident in the Ministry's relationships with the professions of public accountancy, architecture and engineering where the issues at stake are considered to clearly lie outside the questions of law which constitute the principal concerns of the Ministry. Even with the profession of law, however, the arms-length relationship prevails in the governing of the legal profession qua profession, notwithstanding the Attorney General's role in Convocation as "guardian of the public interest."

There are some obvious reasons why the above situation would prevail. Among them, three warrant consideration. The first has to do with the concepts and values of self-government. As noted in preceding chapters, the dominant interpretation of self-government is that the government, once self-government has been established in law, ought not to interfere in the administration of the affairs of a profession. This interpretation has been generally accepted because of both the political principles of independence for professions and the political influence of professionals in our body politic. The former constitutes a justification; the latter, a reality. Moreover, the independence of a profession was and is assumed to imply certain norms of accountability on the part of

professionals vis-à-vis their clients in particular and the public in general. This assumption, however, has carried over into the governing of the professions under authority delegated by the state. As such, public accountability becomes the accountability of the professional practitioners and the organized profession to the public directly. Government is thus bypassed. It may retain an ultimate "check" on self-government and it can alter the conditions of self-government via new legislation but these are considered to be outside of the normal course of administering the "intraprofessional" concerns of an organized profession.

Given this interpretation, secondly, it is not surprising that the self-governing professions have not been considered "responsible to" the executive in the ordinary understanding of that concept. Accordingly, none of the statutes in question requires that the agencies which they establish report to the executive, in this case to the Attorney General. The Ministry, as such, does not have a formal reporting relationship with these agencies. Other than the sporadic contact that results from the procedures of approval required for regulation and the interchange that occurs when legislative revisions are proposed, there exist, with one exception, no mechanisms for ongoing information exchanges.[66]

Finally, given both of the above, it is not surprising that attempts to develop a greater degree of interaction for the purposes of review and assessment would encounter some difficult obstacles. For instance, notwithstanding the considerable emphasis on the importance of the "public interest" in recent years, there has yet to be established in Ontario an explicit set of policy perspectives that might be employed by those with responsibility for ensuring that the regulations, rules and activities of the self-governing professions are in the public interest. More specifically, the appointment of "lay" members to the self-governing bodies of the engineering and legal professions was not undertaken with a clear expression of the perspectives on the public interest that such members were to bring to these bodies.[67] At the same time, no initiatives were taken to enhance the capacities of the executive to formulate the kinds of policy perspective that either lay representatives or representatives of the profession might consider relevant to the public interest, other than those which traditionally have been articulated by the self-governing professions themselves.

In the absence of such initiatives a vicious circle of sorts has emerged. On the one hand, there is this limited capacity to identify the several public interests which are affected by the policies and practices of self-governing professions

and there is almost no capacity to assess the consequences for those interests so affected. On the other hand, without some reliable knowledge of these matters, there is little impetus for the development of the required capacity precisely because it is difficult to know in advance just what kind of expertise is in fact required. When the diffused character of the "third-party" effects of self-government and the demands for independence on the part of self-governing professions are added to this vicious circle, it is little wonder that governments have maintained an "arms-length" relationship with the professions.[68]

What is clear is that the present arrangements do not contain an adequate system of checks and balances. Third-party interests, and indeed even some individual professional and client interests, are not well organized and their dispersal is not just the result of deficiencies in structure. In some important respects this stems from their very character.[69] The self-governing professions are possessed of a size and complexity similar to "big government" and it is not surprising that these third-party interests are only rarely linked to the public interest in any explicit manner. However to describe the current state of affairs in this way is not simply, if at all, to issue a criticism at the executive or, for that matter, the self-governing professions. Rather, what is required is a recognition of this complexity. In part

this means the creation of an organizational design that might begin to develop the capacity incumbent upon the province if the principles of public accountability in self-government are to be realized.

The second major question with respect to the public interest in self-government concerns the role of the legislature in scrutinizing and evaluating the governing of the professions. This role is demanded of the legislature because it is this body that has delegated authority to the professions and, for three of the four professions, has required that the executive assume a responsibility for the exercise of these delegated legislative powers.

From the perspective of public accountability there is little to be reported with respect to this role of the legislature. None of the self-governing bodies are required to report to the legislature and none do. Secondly, although regulations are to be referred to a standing committee of the legislature, as established by The Regulations Act, this committee had, until recently, both restrictive terms of reference and vague functions. As a result, it was largely ineffective in performing its limited functions. It thus has to be resurrected from a state of dormancy. This resurrection has involved the renaming of the committee the Standing Statutory Instruments Committee, an addition to its terms

of reference, and a provision for it to have power to employ counsel and other such staff as it considers necessary.[70] The immediate impetus for these changes was the fourth report of the Ontario Commission on the Legislature which noted that, "There is almost universal dissatisfaction with the functions of the Regulations Committee as currently constituted."[71] The Select Committee of the Provincial Legislature on the fourth report of this Commission agreed with the Commission's conclusions and recommended the changes noted above.

The province, of course, is not the only jurisdiction that has experienced difficulty in establishing the mechanisms necessary for legislative scrutiny and evaluation of the exercise of delegated authority. Nor, for that matter, was the above-noted Commission the first enquiry to bring this matter to public attention in this province.[72] Little, if anything, has been achieved in finding a solution to this problem, however, even though the principles of public accountability demand that the exercise of delegated authority be subject to legislative review and assessment. Without this the legislature has relinquished, not delegated, authority. To the extent that this situation prevails, the concepts of representative and responsible government and the principles of public accountability on which they are predicated are seriously undermined. For all intent and purposes, in other words, the "delegation" of authority is constitutional fiction, not political reality.

What is missing in most attempts to find a solution to the inadequacies of past practices is a sufficient acknowledgement of the serious shortcomings of legislative review and assessment in our modern Canadian experience. Our legislative assemblies have not been well organized for the purposes of serious review and assessment of public administration and, accordingly, they have been ill-equipped to cope with the complexities and exigencies of modern government. It is little wonder that those activities most removed from the scope of the executive's effective responsibilities, such as the administration of the self-governing professions, should seem and be so far afield when the legislature attempts to scrutinize them.[73] Indeed, at present not even the executive possesses the capacity to undertake serious evaluation of these activities.

It goes without saying obviously that there is precious little public scrutiny of the policies and activities of the self-governing professions, given the almost total absence of legislative review and assessment of the agencies of self-government. Our third concern, the publication of and right of access to information on the governing of these professions, nevertheless requires that a number of matters be considered.

In the first place, all agencies but the Public Accountants Council have their regulations published in the Ontario Gazette.

The Council is, by virtue of its Act and notwithstanding The Regulations Act, merely required, "on receipt of the prescribed charges ... (to) supply a copy of any regulation made under this Act and of any forms prescribed by such regulation to any person applying therefor."[74] On the other hand, the rules of the Law Society and amendments thereto, as opposed to its regulations which are published as above, are to be "filed in the office of the Attorney General" and made "available for public inspection in the office of the Secretary" of the Law Society.[75] The Code of Ethics of the Association of Professional Engineers "shall be available free of charge to members of the public who apply therefor."[76]

The above-noted variations are clearly the result of the different traditions of the organized professions and, in part, the different circumstances which prevailed at the time their respective statutes were enacted or amended. Similar variations exist in the ways the governing bodies of these professions report to their memberships. The Public Accountants Council, for instance, issues an annual, albeit brief, report to its licensees. The Treasurer of the Law Society presents an annual "report of the Society's activities since the last annual general meeting."[77] A report by the Registration Board's Chairman is included in the Annual Reports of the Ontario Association of Architects. The Council of the Association of Professional Engineers also reports

annually to its membership. There are, of course, other means of communication by which the governing bodies of these professions inform their memberships of their policies and activities.

Aside from these intraprofessional communications, which to some extent constitute "public" information, there is little in the way of reporting to the public. Information is made available to the public for those who make use of professionals and this takes a variety of forms. In recent years, there has been a greater effort made by the professional organizations both to provide for public education concerning the services and roles of professionals and to promote better relations between the organized professions and the public. All of these initiatives have been taken by the professions themselves; none have been required by law or suggested by government. Furthermore, there have been no requirements, other than those listed above, whereby members of the public have a right to information from the self-governing agencies in question.

That there would be no such right to information concerning the governing of the professions is not surprising in view of the fact that the legislature itself has not required other than the few provisions noted at the outset which cover, in effect, only the "legislation" of these bodies.

This state of affairs is due to at least three major reasons.

First, our traditions have placed considerable emphasis upon the confidentiality of information in the practice of public administration insofar as this administration is considered to lie within the domain of the executive whose relationships to the legislature are governed by the norms of ministerial accountability.[78] These norms constitute an essential component of our principles of public accountability. At the same time, they have led to a public administration characterized by a high degree of secrecy.[79] This character, as was noted in previous chapters, is as much the result of our system of party government as it is a consequence of our system of responsible government. Our legislative assemblies, which ought to serve as a principal source of public information, thus have found themselves increasingly unable to obtain the information necessary for the performance of their functions of scrutiny and evaluation.

Second, and notwithstanding the first point, our traditions have placed considerable emphasis upon the representative nature of our parliamentary system. Accordingly, our elected officials are meant to serve as our representatives for the purposes of both law-making and administration and their public review and assessment.

Finally, the question of public access to information concerning the governing of the professions has not been an item of the agenda of self-government. In part, of course, there are good reasons for the closed character of the governing of these professions insofar as adjudicative matters are involved, most particularly in matters of discipline. In any event, there are rules and regulations that govern the exercise of adjudicative powers.[80] On the other hand, those who suggest that government should maintain an arms-length relationship with the professions are unlikely to support the idea that the public be given access to information. Those who advocate this approach assume that the public interest is adequately protected by existing arrangements, especially where there are lay or "public" representatives on the governing bodies of the professions. A right of access to information is simply not considered necessary.

Part IV: Conclusions and Recommendations

8. Organizing for Self-Government: A Design for Public Accountability

The purpose of the preceding chapters has been to provide both an explication of the fundamental requirements of public accountability in the context of our system of constitutional government and a description and analysis of the present arrangements for self-government in light of this explication. As has been indicated in these chapters, the concepts and values of public accountability clearly underlie our system of constitutional government but the principles which flow from them have not always been upheld in our political experience. To the extent that our principles need further clarification and/or elaboration for the purpose of guiding political practice, an attempt has been made to indicate what changes in understanding are necessary.

It needs to be emphasized that our concepts and values of public accountability are not "frozen" in time. The arrangements of our constitutional system of government are in need of continual evaluation if what is most valuable in our past traditions is to be maintained and our shortcomings are to be overcome. This report has focused, in part at least, on the latter but this ought not to be interpreted as either an assumption or a conclusion to the effect that

our present arrangements for self-government do not contain much that is valuable and, therefore, that ought to be maintained. Rather, the objective has been to highlight those dimensions of self-government where we must learn and improve.

In this concluding chapter, accordingly, a number of recommendations are presented; each is directed to the further development of self-government according to the principles of public accountability as outlined in previous chapters. To some extent this requires that matters previously considered be addressed again and, to an even more limited extent, that a few considerations, not already dealt with for reasons of organization, be introduced.

The Structures of Self-Government

If the state is to delegate authority to organized professions for the purpose of self-government, then the agencies of self-government must be organized properly. Three requirements must be met. First, the manpower necessary to govern a profession must be mobilized. Second, governing bodies must be structured in a manner that provides for an adequate representation of various professional practices. Third, these same governing bodies must also represent all those interests which are affected by self-

government.

The first requirement demands that a profession organized be established as the agent of the state. In this regard both the engineering and legal professions clearly have been organized for the purpose of self-government. The professions of architecture and public accountancy, however, are each deficient in terms of this requirement. The former does have a clear agency relationship with the state but the Registration Board of its Association is part of an organization that has objectives unrelated to self-government. Although both the Board and the Council of this Association are primarily concerned with self-government, the fundamental requisite of self-government ought to be considered paramount. For this reason, it is recommended that the two "governing" bodies be reconstituted as a single body in order to make explicit the primary purpose of the Association, namely self-government. The professional interests of architects ought not to be in any way restricted by such a development but, as is the case in the legal profession and the engineering profession, it will require that the Association divest itself of functions whose primary purpose is the promotion of the socio-economic interests of architects. If architects wish to have these functions continued, they should organize for these purposes; the Association, as the agent of the state for the purposes of self-government, should not be

used to achieve them.

The establishment of the Public Accountants Council reflected a measure of conflict within this profession. Over the last decade this conflict has subsided in some respects, increased in others. In the process, the governing of this profession has suffered insofar as public accountability is concerned. This is due to the fact that the agent of the state for the purposes of self-government has not been sufficiently integrated with what, for the greater part, constitutes the profession organized, namely the Institute of Chartered Accountants. In order to achieve the required integration it is recommended that the Council of the Institute be established as the governing body for the purposes of self-government. The Institute, accordingly, must be recognized as the profession organized for the purposes of self-government. Those who are not members of this organization but who are licensed as public accountants must be accommodated by such a reorganization of course. However, to allow the current situation to continue would be to perpetuate a system that not only restricts the concept of self-government to the licensing function (even in its broadest meaning) but also enables disputes over matters of public policy to be conducted exclusively between those who do or wish to practise as public accountants. A concomitant of this recommendation is that the Institute's exclusive responsibility must be to

govern the profession in the public interest. It follows then that it also must divest itself of whatever activities it undertakes which are primarily concerned with the promotion of the socio-economic interests of accountants.

The second requirement for the structures of self-government is that the governing bodies of the professions be so constituted that they provide for the broadest possible representation of the provincial profession. To this end each of the four professions give some measure of recognition to this principle. The Institute of Chartered Accountants, for instance, in appointing members to the Public Accountants Council makes an effort to ensure a recognition of both geographical and type of practice representation. The Registration Board of the Ontario Association of Architects is not so constituted but the Council of the Association is based upon a regional representation. The Council of the Association of Professional Engineers is established on an even more representative basis in that both regional representation and representation from the major fields of engineering are provided for in the governing body. Finally, the Law Society's Convocation is constituted in large part on the basis of elected geographical representation.

For obvious reasons the requirements of professional representation will vary from profession to profession.

Clearly, however, representation of the regions of the province ought to be established as a fundamental standard for all governing bodies in order that the clientele of the professions who are themselves located throughout the province be effectively represented. It is thus recommended that changes to the governing bodies of public accountancy and architecture, as recommended above, be made in accordance with the requirements for regional representation found in the engineering or legal professions, preferably the former given its greater specificity. It might also be appropriate for the Law Society to institute a more differentiated system of geographical location beyond the two regions now recognized.

Secondly, there is obviously considerable merit in the policies of the Institute of Chartered Accountants and the Association of Professional Engineers whereby an effort is made to provide for the representation of types of fields of practice. In neither case, however, is this representation obtained via election. The Institute uses its appointment powers to achieve this; the Council of the Engineers Association accomplishes this by submitting lists to the Lieutenant Governor in Council which then makes the necessary appointments. In each case, however, both greater depth and breadth are assured in the composition of the respective governing bodies.

It perhaps goes without saying that, given the need for regional representation, this additional requirement introduces a not insignificant complication if such representation is to be obtained on other than the appointment system. Furthermore, it would be inappropriate for this report to suggest what criteria should be employed in designating the specific types or fields of practices to be represented in each profession. Accordingly, it is recommended that the necessary criteria and procedures be proposed by the Professional Organizations Committee in its report.

The third requirement with respect to structure stems from the need to have what we have called "third-party" interests represented on the governing bodies of these professions. In some ways the need for this kind of representation has been recognized insofar as "lay" or "public" representatives have been added to the governing bodies of self-governing professions. As suggested in previous chapters, however, a further clarification of the roles of such representatives is in order if the principles of public accountability and the value of self-government are to be fully acknowledged.

The requirements included here are twofold. In the first place, there are a number of non-client interests affected by the rules and regulations of self-government. These would include, for instance, the interests of those aspiring to

enter a profession or whose activities are related to the practice of a particular profession - namely, paraprofessionals or allied professionals. In some cases it is possible, without much difficulty, to identify these interests. In other cases and for obvious reasons, for instance, changes in the legal or economic environments in which a profession operates or innovations in the technologies employed by professionals, a greater degree of difficulty is present. However, at the very least it is clear there exists one type of representation that could be utilized by each of the four professions, namely the selection of persons from the academic communities which provide a good part of the education and training which are demanded as a prerequisite for entering these professions. Although relationships between the practitioner and academic sectors are recognized as crucial in each of the four professions, only the Registration Board of the Association of Architects requires representation from the academic sector. It is recommended that on the governing bodies of all four professions there be instituted representation of this kind. This representation would be professional, of course, in that those who would qualify would come from the academic side of the professions. The logic of this recommendation, nevertheless, is that a particular professional expertise would be added in order to represent those public interests which deal with other than professional-client relationships. For somewhat the same

but not identical reasons it is recommended that, taking into consideration the particular character of each of the professions in question, representation from paraprofessions and allied professions be added. Relationships between these groups and the several professions do exist in each of the four professions but not at the level of policy-making. Rather, various sorts of joint ad hoc or special committees have been the practice. Greater recognition of the interrelationships between these groups is needed and would be facilitated by the appointment of individuals competent to represent the public interests at stake in the ordering of these same relationships.

The other kind of representation required in this third category is for those third-party interests which are the most difficult to identify and represent. Included here would be the interests of the general public in the cost and distribution of professional services. Unlike the representation noted above it is not possible here to suggest what kind of persons ought to be selected. In some instances, as is the case with the Council of the Association of Professional Engineers for example, legal expertise might be appropriate and desirable. What can be suggested, and what is often the implicit reason why lawyers are singled out for such positions, is that persons selected for such roles should have experience in the goverance of "public" affairs. Required, in other words, are persons

with a capacity to recognize the consequences of rules and regulations, especially those rules and regulations thought to be of concern only to a particular group in society. Persons with this kind of capacity not only are more likely to bring a perspective to the governing of the professions that adds to the range of public interests considered (and therefore enhancesthe capacities of self-government); they also can provide a greater appreciation of the need for empirical analyses of the consequences of rules and regulations, as for instance has been developed in a number of the health professions regarding questions of manpower and its distribution.[81]

Finally, it must be pointed out that if the above recommendations are to be implemented, the governing bodies of these professions must be composed of at least two dozen members. For two reasons a number in this order is required. First, a clear majority of members must come from the profession if the fundamental concepts and values of self-government are to be realized. Second, this approximate size is necessary if a governing body is to act as a deliberative and policy-making agency, that is if these bodies are to function as the governing agencies of the state for the purposes of self-government and not merely as the executive councils of professional associations. It should be noted, accordingly, that for administrative

purposes each of these bodies should possess an executive and for adjudicative functions arrangements can be made to ensure that numbers do not interfere with orderly and just procedures.

The Processes of Self-Government

In Chapter 6 it was noted that the regulations of the Public Accountants Council do not require the approval of the Lieutenant Governor in Council; nor are they to be found in the Ontario Gazette. The reorganized governing agency recommended for the profession of public accountancy should have its regulations subject to such approval and, as is the case with all regulations, these should be published in the Ontario Gazette.

Secondly, as was implied in Chapter 6, the membership of the four professions organized for self-government ought to be included in the legislative process. It is recommended that this objective be accomplished by providing both a procedure for approval and a power of initiative. In the former case, the provision contained in the act governing the engineering profession should be used; in the latter case, the provision found in the rules of Convocation of the Law Society should be adopted. In each instance, such provisions should be set out in the enabling statutes. It is not recommended, however,

that regulations require more than majority support as is currently the case in the governing of public accountancy. The above provisions, it is suggested, provide ample opportunity for checks and caution in the regulation-making process.

Thirdly, it is recommended that a serious effort be made to ensure that all matters of "policy" be dealt with by regulations, not by rules. Although some progress has been made in recent years toward this objective, there remains an unrealistic differentiation between policy and administrative (or "domestic") matters that is biased in favour of a liberal interpretation of the latter. This bias ought to be in the other direction for all those matters which are in the "grey" zone between policy and administration.

The three above sets of recommendations are intended to ensure that both the principles of self-government in general and the principles of public accountability in particular are upheld and promoted. It is especially important, accordingly, that the memberships of the professions be afforded the greatest possible role in policy-making and, on the other hand, that the processes of policy-making be managed in a manner which gives the widest possible interpretation to the definition of policy. In these ways the concept of "agency" is most effectively acknowledged and, equally critical, the

public character of the "governing" of the professions is recognized.

The Public Interest in Self-Government

The public interest in self-government is not upheld simply by establishing the appropriate structures and processes of "self-government." It also demands that the interrelationships between self-governing and the larger context of governing within which it takes place be properly established. In this regard there are at least three sets of relationships which require attention.

In the first place, the relationship of the self-governing agencies to the executive branch of government is one that at present is beset with organizational and procedural deficiencies. In the previous section of this chapter it was recommended that the requirement of Lieutenant Governor in Council approval be extended to all four agencies. It was further recommended that the power of regulation be extended over a broader range of matters. For each of these recommendations to have their full effect, it is necessary that the capacity of the executive to review and evaluate the policies and practices of self-governing agencies be enhanced. This entails, at a minimum, three developments. It is recommended, accordingly, first, that the self-governing agencies submit annual reports to the Lieutenant

Governor in Council; second, that the provision found in The Law Society Act whereby the Attorney General "may at any time require the production of any document, paper, record or thing pertaining to the affairs of the Society"[82] be included as a general provision in the statutes governing the other three professions; and third, that a review and evaluation agency be established within the executive branch to provide the Lieutenant Governor in Council the kind of assessment required if this body is to exercise its responsibility vis-à-vis the self-governing agencies.

The first two recommendations set forth above are straightforward. Information is central to all phases of governing and the executive needs to be well informed if it is to pass informed judgement on the exercise of delegated authority by self-governing agencies. To this end, agencies should issue detailed reports, not "telegrams", to the executive. The executive also should possess the power to demand information from these agencies. But more than this is necessary if "information" of whatever volume is to be meaningful; that is, if it is to be "knowledge" of policy, practice and consequences. It is for this reason that the executive branch must develop the capacity to pass informed and knowledgeable judgement on self-government. Without this capacity, the review and approval processes recommended, even those now in place, cannot ensure that a serious and thorough effort is made to assess policy and

policy proposals from the perspective of the public interest. Indeed, without this capacity there is unlikely to be other than a very crude understanding of the public interest in self-government on the part of the executive branch. Moreover, given the policy processes of the Ontario system, it is even less likely that there will be any significant incentive for the development of a more sophisticated understanding if there does not exist an agency to assist in the development and appreciation, within government, of the same.

The agency recommended above, however, should not be established as a "super-regulatory" agency; on the other hand, it should not be simply an advisory body.[83] A further bureaucratization in the governing of the professions is neither desirable nor needed. Yet, at the same time, advice given in the absence of well organized research and analysis is seldom sufficient when the questions under consideration are complex and political. What is needed is an agency which possesses the power to obtain information and the analytical competence to intepret the data so obtained such that self-government might be assessed. Self-government is upheld because the executive branch cannot intervene directly in policy-making. But, it will be subject to scrutiny from a broader perspective that one would normally and for legitimate reasons expect from self-governing agencies.

Just where this agency ought to be located within the executive

branch in Ontario raises a number of difficult questions for at least two reasons. First, so long as the Attorney General remains the minister responsible for the statutes under which self-government is established for these four professions, with the exception of the legal profession, the Ministry of the Attorney General would seem to be an odd place for this kind of agency. Given the concerns of this Ministry and the responsibilities of this proposed agency, then either this agency should be an interdepartmental one or more than one is required. Second, if this agency were to be established as an agency to serve the Lieutenant Governor in Council, that is the Cabinet, then should its scope be expanded to encompass the self-governing professions not considered in this report?

The above questions do not admit of easy answers. However, in this report on public accountability in the governing of the professions two considerations have been paramount. The first is that the concepts and values of self-government are not only well established in Ontario and they provide for an effective approach to the governing of the professions that should be tampered with only insofar as important political principles take precedence. Secondly, the principles of public accountability do require that changes be made but not in such a way that self-government be undermined. Indeed, an attempt has been made to show that self-government itself

can be further advanced by adherence to these latter principles since their implementation ought to promote a better understanding and appreciation of the values and concepts of self-government. On the basis of these two fundamental considerations, it is recommended that this review and evaluation agency be located, at least at the outset, at the centre of the executive arena rather than at the ministerial or departmental level. It needs to be emphasized that the purpose of this recommendation is not "centralization" but rather the promotion of the broadest possible interpretation of the public interest in the governing of the professions in Ontario. As such, it should serve the Regulations Committee of Cabinet but its mandate should not be restricted to the assessment of the "regulations" submitted to this Committee. On the contrary, its terms of reference and the size and character of its staff should enable it to act as a resource to this Committee for the purpose of developing a policy perspective on the public interest in the governing of the professions.

The second relationship of importance to the question of the public interest in self-government involves the way in which self-governing agencies relate to the provincial legislature, from which their authority emanates. We have noted in Chapter 7 that this relationship has been less than satisfactory from the perspective of public accountability.

Two changes, both obvious requirements, are recommended in the hope that some improvements might be effected in this relationship. The first is that the annual reports, which are to be submitted to the executive, also be tabled in the legislature. The second is that the recently resurrected and renamed Standing Statutory Instruments Committee be required, in addition to its oversight functions concerning regulations, to examine the annual reports of the self-governing professions. Moreover, it is recommended that it obtain such staff as is needed for it to undertake committee proceedings at which officials from both the proposed review and evaluation agency and the governing bodies of the professions should be questioned. At the conclusions of these proceedings, this Committee should submit a report to the legislature in which an assessment of the policies and administration of the self-governing agencies is made.

It is recognized that such an accounting to the legislature constitutes an innovation as far as the self-governing professions are concerned. It is also recognized that since the professions in question do not require an appropriation of public funds, the incentive to examine effectiveness and efficiency in the exercise of delegated authority is minimized. However, it is precisely because these agencies govern <u>via</u> the regulatory rather than expenditure instrument that their use of the authority of the state should be subject

to the most public scrutiny possible. The public interest, it must be emphasized, is as much affected by regulation as it is by expenditure.

Finally, there is an obvious requirement, arising out of our interpretation of our constitutional system, that the body politic of Ontario possess a right of access to government information; that is, the documentation upon which policy and administration are based. The matter of increased publication by self-governing agencies has been dealt with above insofar as the question of public accounting is concerned. As was noted in Chapter 7, however, the concepts and values of representative government demand that the rights of citizens to information not be restricted to either that which is made public at the discretion of governmental agencies or that which is generated by the processes of legislative scrutiny. The general principle involved is at present the subject of an enquiry by the Province of Ontario and there exists no *a priori* reason why self-government ought to be exempt from the entire question of public access to government information. There are questions which must be addressed insofar as individual rights in the process of adjudication are crucial to the governing of the professions. But, notwithstanding the obvious safeguards which must be and in fact are built into self-government in order to protect confidential information concerning individuals, the rights of citizens

to government information should encompass the self-governing professions. As has been argued in regard to the preceding recommendation, the recognition of this kind of right not only promotes public accountability in self-government, it should also serve to uphold self-government itself.

FOOTNOTES

1. A useful introduction to the principles and forms of governmental organization in the Canadian experience is found in J. E. Hodgetts, The Canadian Public Service (Toronto: University of Toronto Press, 1973), especially pp. 138-156.

2. See, for instance, Canada, Third Report of the Special Committee of the Commons on Statutory Instruments, October 22, 1969, especially pp. 1414-1419.

3. For analyses of these developments, see Peter Silcox, "The Proliferation of Boards and Commissions", in Trevor Lloyd and Jack McLeod (eds.), Agenda 1970: Proposals for a Creative Politics (Toronto: University of Toronto Press, 1968), pp. 115-134; Eric Hehner, "Growth of Discretions - Decline of Accountability", Kenneth Kernaghan (ed.), Public Administration in Canada, 3rd Edition (Toronto: Methuen, 1977), pp. 323-333; and R. I Cheffins and R. N. Tucker, The Constitutional Process in Canada, 2nd Edition (Toronto: McGraw-Hill, 1976), pp. 49-76.

4. These reasons are set forth in G. Bruce Doern, "The Concept of Regulation and Regulatory Reform", G. Bruce Doern and V. Seymour Wilson (eds.), Issues in Canadian Public Policy (Toronto: Macmillan, 1974), pp. 8-35.

5. See, for instance, H. N. Janisch, "The Role of the Independent Regulatory Agency in Canada", (1978) 27 University of New Brunswick Law Journal 83; and Carolyn J. Tuohy and Alan D. Wolfson, "The Political Economy of Professionalism: A Perspective", Four Aspects of Professionalism (Ottawa: Consumer Research Council, Canada, 1977), pp. 41-90.

6. This concept and its practical implications are thoroughly examined in Tuohy and Wolfson, "A Political Economy of Professionalism: A Perspective", op.cit. My approach to the question of the relationships between self-governing professions and the state is largely based on this seminal work.

7. Ibid., p. 48.

8. The Public Accountancy Act, R.S.O., 1970, chapter 373.

9. Ibid., s. 7.

10. Ibid., s. 31(1).

11. Ibid., s. 1(a).

12. Ibid., s. 9(1).

13. Ibid., s. 31(3).

14. The Architects Act, R.S.O., 1970, Chapter 27.

15. Ibid., s. 10(1), (2).

16. Ibid., s. 8(1).

17. See ibid., s. 11.

18. The Professional Engineers Act, R.S.O., 1970, Chapter 366, as amended 1972, Chapter 45, s. 3.

19. Ibid., s. 7 (1).

20. Ibid., s. 8(1).

21. Ibid., s. 4.

22. Ibid., s. 17(5).

23. Ibid., s. 20.

24. The Law Society Act, R.S.O., 1970, Chapter 238.

25. Ibid., s. 55.

26. Ibid., s. 54(1).

27. Ibid., s. 54(2).

28. Ibid., s. 50(1).

29. See Professional Conduct Handbook, Revised to October 1975, Law Society of Upper Canada, Osgoode Hall, Toronto.

30. The Law Society Act, R.S.O., 1970, Chapter 238, s. 10.

31. Ibid., s. 11, 12, 13, 14, 15, 23a.

32. Rules made under The Law Society Act, Revised, 1975, The Law Society of Upper Canada, Osgoode Hall, Toronto, 52(8).

33. The textbook treatment of this phenomenon is provided in R. MacGregor Dawson, The Government of Canada, 5th Edition, revised by Norman Ward (Toronto: University of Toronto Press, 1970), J. R. Mallory, The Structure of Canadian Government (Toronto: Macmillan, 1971) and Richard J. Van Loon and Michael S. Whittington, The Canadian Political System, 2nd Edition (Toronto: McGraw-Hill, 1976). The classic treatment of Ontario is F. F. Schindeler's Responsible Government in Ontario (Toronto: University of Toronto Press, 1969).

34. For a comprehensive analysis of this question, see A.H. Birch, Representation (London: Macmillan, 1972).

35. That British political theorists considered the system of representation to be what James Mill called "the grand discovery of modern times", see A.H. Birch, Representative and Responsible Government (London: George Allen and Unwin, 1964), especially pp. 44-47.

36. An excellent account of this transformation is provided in Harvey Mansfield, Jr., "Hobbes and the Science of Indirect Government", American Political Science Review, LXV (March, 1971), pp. 97-110.

37. On the British experience in this regard, see R. T. McKenzie, British Political Parties (London: Heinemann, 1963); on the Canadian experience, F. C. Englemann and M. A. Schwartz, Canadian Political Parties: Origin, Character, Impact (Toronto: Prentice-Hall, 1975).

38. See Birch, Representative and Responsible Government, op.cit., especially pp. 131-170, and Dawson, The Government of Canada, op.cit., pp. 3-19.

39. See W. A. Matheson, The Prime Minister and the Cabinet (Toronto: Methuen, 1976) and R. M. Punnett, The Prime Minister in Canadian Government and Politics (Toronto: Macmillan, 1977).

40. For an articulate critique of the discipline of political science in Canada, see Alan C. Cairns, "Alternative Styles in the Study of Canadian Politics", Canadian Journal of Political Science, VII, 1 (March, 1974), pp. 101-127.

41. A description of several of the most important developments at the level of the federal government is presented in G. Bruce Doern and Peter Aucoin (eds.), The Structures of Policy-Making in Canada (Toronto: Macmillan, 1971); for a description of the changes which resulted from the recommendations of the Committee on Government Productivity of Ontario, see George J. Szablowski, "Policy-Making and Cabinet: Recent Organizational Engineering at Queen's Park", in D.C. MacDonald (ed.), Government and Politics of Ontario (Toronto: Macmillan, 1975), pp. 114-134.

42. For example, see the Government of Canada's proposals in Canada, Crown Corporations: Direction, Control, Accountability (Ottawa: Minister of Supply and Services, 1977).

43. A useful comparative perspective for Western Europe, Japan and North America is presented in Michael Crozier, Samuel P. Huntington and Toji Watanuki, The Crisis of Democracy, Report on the Governability of Democracies to the Trilateral Commission (New York: University Press, 1975).

44. A succinct but perceptive treatment of this sudden concern for accountability is provided by J. E. Hodgetts in his "Bureaucratic Initiatives, Citizen Involvement and the Quest for Administrative Accountability", Transactions of the Royal Society of Canada, Series IV, Vol. XII, 1974.

45. The increasing use of such instruments as task forces and opinion surveys as alternative mechanisms to determine public opinions is discussed in F. Schindler and C. M. Lanphier, "Social Science Research and Participatory Democracy in Canada," Canadian Public Administration, Vol. XII, No. 4 (Winter, 1969), pp. 481-498.

46. See, for example, the considerable caution articulated in the Government of Canada's green paper on this question; Secretary of State, Legislation on Public Access to Government Documents (Ottawa: Minister of Supply and Services, 1977).

47. For a discussion of the federal Parliament's experience in this regard, see Robert J. Jackson and Michael M. Atkinson, The Canadian Legislative System (Toronto: Macmillan, 1974). The recent Ontario experience is discussed by Donald C. MacDonald, "Moderning the Legislature", MacDonald, Government and Politics of Ontario, op.cit., pp. 93-113.

48. Government of Ontario, Royal Commission on the Inquiry into Civil Rights, Report, No. 1, Vol. 3 (Ontario: Queen's Printer, 1968), Chapter 79, pp. 1162-1166.

49. Ibid., p. 1166.

50. For a general discussion of these matters, see Tuohy and Wolfson, "The Political Economy of Professionalism: A Perspective," op.cit., especially pp. 81-85.

51. For an analysis of the assumptions which underlie this claim, see Carolyn J. Tuohy, "Private Government, Property and Professionalism", Canadian Journal of Political Science, IX, 4 (December, 1976), pp. 668-681.

52. Government of Ontario, Royal Commission of Inquiry into Civil Rights, op.cit., p. 1162.

53. That this has too often been the case, see ibid., pp. 1162-1171.

54. For a description of this approach, see René Dussault and Louis Borgeat, Reform of the Professions in Quebec (Quebec: L'éditeur officiel du Québec, October, 1976), especially pp. 50-66.

55. Government of Ontario, Committee on the Healing Arts, Report, Vol. 3 (Ontario: Queen's Printer, 1970), p. 43.

56. See, again, Doern, "The Concept of Regulation and Regulatory Reform", op.cit.

57. As the Report of the Special Committee on Statutory Instruments noted (p. 1411): "For parliamentary government is a system of government which requires that the executive be responsible to the legislature and that both be accountable to the people, and there can be neither responsibility nor accountability where there is no knowledge of what has been done."

58. Data on the composition of the public accounting profession may be found in Appendix A to the Research Directorate's Staff Study, "History and Organization of the Accounting Profession in Ontario", 1978.

59. It should be noted that a draft of a revised Architects Act includes a description of the Board which states that it "shall consider the manner in which members are discharging their professional responsibilities to the public." See Ontario Association of Architects, Draft Revised Architects Act.

60. The Law Society Act, s. 13(1).

61. For an evaluation of these developments, see H. W. Arthurs, "Authority, Accountability, and Democracy in the Government of the Ontario Legal Profession", Canadian Bar Review, 49 (March, 1971), pp. 1-23.

62. The Professional Engineers Act, s. 7(2,a).

63. The Public Accountancy Act, s. 9(2).

64. Government of Ontario, Royal Commission on the Inquiry Into Civil Rights, op.cit., Chapter 80. Also, see Government of Ontario, Committee on the Healing Arts, Report, op.cit., pp. 52-55.

65. For a discussion of the deficiencies in any approach which is not biased in this direction, see John Willis, "The McRuer Report: Lawyers' Values and Civil Servants' Values", University of Toronto Law Journal, Vol. 18, 1968, pp. 351-360.

66. The Registrar of the Council of the Association of Professional Engineers is required to "send to the Lieutenant Governor in Council quarterly as of the last days of March, June, September and December in each year a report containing, with respect to the immediately preceding three-month period, the names of the persons

(a) who have been granted partial exemption from examinations;

(b) who have been granted no exemption from examinations;

(c) who have been refused permission to write examinations; or

(d) who have not been admitted to membership in the association because,

(i) their experience in engineering work was not satisfactory to the council, or
(ii) they did not provide satisfactory evidence of good character,

giving, in each case the reason for the decision, to the Council such further information and particulars with respect to such matters and the Lieutenant Governor in Council may require." The Professional Engineers Act, s. 22(4). It should also perhaps be noted that the Public Accountants Council is required "within three months after the end of each fiscal year [to] forward a copy of the audited accounts of the Council for that year to the qualifying body and to the Provincial Secretary." The Public Accountancy Act, s. 30(1).

67. Neither the McRuer Commission nor the Committee on the Healing Arts were very specific on this matter. The public statements of the Office des Professions du Québec, although exhibiting a greater enthusiasm for "public participation", are likewise of little assistance in this regard. See, for instance, Dussault and Borgeat, Reform of the Professions in Quebec, op.cit., p. 16-18.

68. For a general discussion of a somewhat analogous dilemma - the kind of knowledge that is needed for the governing of science and technology, see Peter Aucoin and Richard French, Knowledge, Power and Public Policy (Ottawa: Information Canada, 1974), Science Council of Canada, Report No. 31.

69. See Michael J. Trebilcock, "Winners and Losers in the Modern Regulatory State: Must the Consumer Always Lose?", Osgoode Hall Law Journal, Vol. 13, No. 3 (December, 1975), pp. 619-647 for a discussion of a number of these matters in the context of economic regulation.

70. Government of Ontario, Votes and Proceedings, Legislative Assembly of the Province of Ontario, First Session, 31st Parliament, Tuesday, June 28, 1977, p. 23.

71. Government of Ontario, Commission on the Legislature, Fourth Report (Toronto, September, 1975), p. 40.

72. See, for instance, Ontario, Interim Report of the Select Committee to Examine into and to Study the Administrative and Executive Problems of the Government of Ontario, November 17th, 1960.

73. The recent Ontario Committee on Government Productivity, for instance, while it was concerned about "accountability" and although it did recommend that "all agencies report to the Legislature through a Minister", can hardly be said to have paid sufficient attention to this fundamental question. That the legislative process may have been outside its terms of references merely indicates the extent to which the legislature is ignored in terms of its role in "governing". See Committee on Government Productivity, Report Number Nine, (Ontario, March, 1973), pp. 29-53.

74. The Public Accountancy Act, s. 31(2).

75. Rules, The Law Society of Upper Canada, s. 54(3).

76. The Professional Engineers Act, s. 9(2).

77. Rules, The Law Society of Upper Canada, s. 52(2).

78. See, again, Secretary of State, Legislation on Public Access to Government Documents, op.cit.

79. Task Force on Government Information Services, "Administrative Secrecy in Canada", Kernaghan, Public Administration in Canada, op.cit., pp.356-363.

80. See, Government of Ontario, Ministry of the Attorney General, Statutory Powers Procedure Rules Committee, Annual Report, May, 1976.

81. The Province's experience with legal aid, administered by the Law Society, also provides a good example of the kind of extraprofessional input that can be usefully added to the governing of the professional body. Notwithstanding the recommendations of the recent task force on Legal Aid to remove the administration of this programme from the Law Society, it is clear that self-government can be an effective and accountable instrument for public administration. It is also clear, it should be noted, that this task force did not understand the agency role of the Law Society in its administration of legal aid or in its governing of the profession. It states, for instance, that "the Law Society is by statute the governing body of the legal profession and must be primarily concerned with its welfare" (emphasis added). Government of Ontario, Ministry of the Attorney General, Report of the Task Force on Legal Aid, Part I (Ontario: Queen's Printer, 1974), p.23.

82. The Law Society Act, s. 13(1).

83. The experience of the Law Society with respect to the attempt to provide for this function via a "Law Society Council" provides a useful commentary on the ineffectiveness of such mechanisms when the essential research and analysis efforts are not provided for. On this experience, see Arthurs, "Authority, Accountability, and Democracy in the Government of the Ontario Legal Profession," op.cit.

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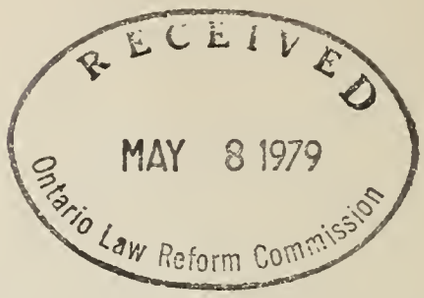

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